88-2022

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, NEW MEXICO, et al.,

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Tenth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Did the U.S. District Court and the U.S. Circuit Court of Appeals, by not considering the appropriate Federal Statute (43 U.S.C. 383) and the U.S. Supreme Court decision (United States v. Gerlach Livestock Co., 339 U.S. 725 (1949)) requiring the U.S. District Court to apply the law of the State of New Mexico in determining the liability of the United States when irrigation water or vested water rights were taken, as they were in the instant case, decide a federal question in a way in conflict with applicable decisions of the U.S. Supreme Court by denying this trial by jury and denying the use of New Mexico law to establish the liability of the United States to the condemnees?

2. Did the United States District Court and the United States Circuit Court of Appeals, by deciding that

exceptional circumstances existed under Rule 71A(h) of the Federal Rules of Civil Procedure for the appointment of the Commission, decide a federal question in conflict with the applicable decisions of the U.S. Supreme Court?

3. Did the United States District Court and the United States Tenth Circuit Court of Appeals permit the appointment of a commission without notifying the condemnees of their qualifications and finally deciding that a challenged Commissioner was to be seated without making him available for examination after being challenged for cause was within the discretion of the Judge, unless actual bias has been demonstrated beyond possibility of disagreement, overturn the decision of the United States Supreme Court in issuing Rule 71A(h), U.S. District Court Rules?

Do these acts by the Court decide a federal question in conflict with the decisions of the U.S. Supreme Court to issue this Rule 71A(h), and the Federal Statute implementing it, 28 U.S.C. 2072?

PARTIES TO THE PROCEEDING

Wilma Dean Truitt, individually, and as personal representative of the estate of William M. Truitt (deceased), Wilma Jean Evans (daughter) and Larry Evans and as Trustee under the Last Will and Testament of William Marshall Truitt (deceased); Viola Gibson Howell (widow, now deceased), the estate of James E. Howell (deceased), Richard Howell, Shirley Howell, James Howard Howell, Betty Howell (all condemnees); and The United States of America, as condemnor.

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PRAYER

Petitioners pray for a Writ of Certiorari to review a decision of the United States Tenth Circuit Court of Appeals.

OPINIONS BELOW

1. Amended Order Appointing Commissioners (on Truitt Case), filed November 13, 1984;

2. Amended Order Appointing Commissioners (on Howell Case), filed November 13, 1984;

3. Second Amended Order Appointing Commissioners (on Truitt Case), filed January 30, 1985;

4. Second Amended Order Appointing Commissioners (on Howell Case), filed January 30, 1985;

5. Memorandum Opinion and Order (on Truitt case), filed March 25, 1985;

6. Memorandum Opinion and Order (on Howell case), filed March 25, 1985;

7. Report of the Land Commissioners (on Truitt case), filed July 25, 1985;

8. Report of the Land Commissioners (on Howell case), filed June 29, 1985;

9. Memorandum Opinion and Order (on Truitt case), filed January 16, 1986;

10. Memorandum Opinion and Order (on Howell case), filed January 16, 1986;

11. Order (on Truitt case), filed February 14, 1986;

12. Order (on Howell case), filed February 14, 1986;

13. Final Judgment (on Truitt case), filed February 14, 1986;

The U.S. District Court finds judgment in the amount offered by the

United States based on a total taking and on findings of the Commissioners appointed by the United States District Court.

14. Final Judgment (on Howell case), filed February 14, 1986;

The U.S. District Court finds judgment in the amount offered by the United States based on a total taking and on findings of the Commissioners appointed by the United States District Court.

15. U.S. Tenth Circuit Court of Appeals, Order and Judgment in the Truitt case, the Howell case and the Greenwood case, filed December 13, 1988; (Affirms District Court judgment)

16. U.S. Tenth Circuit Court of Appeals, Order Denying Rehearing in the Truitt case, the Howell case and the Greenwood case, filed February 13, 1989.

JURISDICTION

(i) Date of the judgment or decree sought to be reviewed: December 13, 1988;

(ii) The dated order respecting rehearing: February 13, 1989;

(iii) 28 U.S.C. 1251; 28 U.S.C. 2101(c); 28 U.S.C. 1254; and 28 U.S.C. 2108.

STATUTES INVOLVED

The Advisory Committee Opinion on Rule 71A(h)

Too long and voluminous to copy here.

Rule 38, New Mexico Rules of Civil Procedure

1-038. Jury trial in civil actions.

A. Jury demand. In civil actions any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue.

Rule 71A(h), New Mexico Rules of Civil Procedure.

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character,

location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualification of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of

all issues shall otherwise be by the court.

Title 28 U.S.C. Section 2072

Section 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken

effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Title 43 U.S.C. Section 373.

Section 373. General authority of the Secretary of the Interior

The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Title 43 U.S.C. Section 383.

Section 383. Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect the right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Section 42-1-10 N.M.S.A. 1978 as amended.

42-1-10. Measure of damage to remainder in partial condemnation.

Notwithstanding provisions of the Relocation Assistance Act [42-3-1 to 42-3-15 NMSA 1978], in any condemnation proceeding in which there was a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before and after the taking shall be considered even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed noncompensable. Further, in determining such values or differences therein, elements which would enhance or benefit any property not taken shall only be considered for the purpose of offsetting any damages or diminution of value of the property not taken.

Section 42-2-11 N.M.S.A. 1978 as amended.

42-2-11. Election of trial by court or jury.

Any party desiring to try the causes before a jury, shall make demand and deposit jury fees pursuant to Rule 38, Rules of Civil Procedure, and any

other applicable rules of civil procedure.

The court with or without a jury may separately try the case involving each tract of land affected which is under different ownership, or separate tracts under the same ownership.

Section 42A-1-21 N.M.S.A. 1978 as amended.

42A-1-21. Trial.

A. Within twenty days after the filing of the petition if an appraisal has been prepared pursuant to Section 42A-1-5 NMSA 1978 or after the final confirmation of the report of the commissioners, a party may demand trial of any issues remaining in the cause. The cause shall be tried de novo, and unless waived, the parties shall be entitled to a trial by jury.

B. If no issues other than compensation are raised, the court shall render a final judgment awarding the property to the condemnor contingent upon payment of the awarded compensation to the condemnee. In all other cases, the court shall render final judgment upon decision of all contested questions of law and fact.

Section 42A-1-26 N.M.S.A. 1978 as amended.

42A-1-26. Measure of damage to remainder in partial condemnation.

In any condemnation proceeding in which there is a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference between the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before and after the taking shall be considered even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed noncompensable. Further, in determining such values or differences therein, elements which would enhance or benefit any property not taken shall only be considered for the purpose of offsetting any damages or diminution of value of the property not taken.

Section 72-1-2 N.M.S.A. 1978 as amended.

72-1-2. [Water rights; appurtenant to land; priorities.]

Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or

other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water, so long as the water can be beneficially used thereon, or until the severance of such right from the land in the manner hereinafter provided in this article. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to March 19, 1907, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of water initiated thereafter shall relate back to the date of the receipt of an application therefor in the office of the territorial or state engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder.

STATEMENT OF THE CASE

1. In September 1984, the Department of the Interior Bureau of Reclamation condemned portions of two ranch and farm units owned by the condemnees, the Howells and the Truitts for the Brantley Dam Project.

Both of the partial takings included the taking of irrigation and stock watering rights attached and appurtenant to the ranch and farm units owned by the Howells and by the Truitts. These were vested interests in water rights, and recognized as such by New Mexico Law.

2. The condemnation action was timely answered with a timely demand for jury trial pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure by both the Howells and the Truitts. The Court denied the jury demand and refused

to consider New Mexico law in setting just compensation.

3. The Court appointed a three member commission. These Commissioners were appointed and re-appointed without ever having notified the condemnees of the qualification of the Commissioners. The condemnees, the Howells and the Truitts, moved to strike the Commission and to reinstate a jury and also challenged the seating of Commissioner Zinn based on his bias and a lack of qualifications.

4. The condemnees, the Howells and the Truitts challenged Commissioner Zinn for his statement to a group of contractors, that he would find no implied warranty for work done by contractors when he also was soliciting employment as an arbitrator, and further, had stated for the record in another condemnation case that he would

not follow the instructions of the Court in finding the value of property if it included increments of use or appurtenances to the land for he would only use comparable sales. The U.S. Attorney met ex-parte, outside of the presence of condemnees' attorneys, with Commissioner Zinn to discuss his qualifications, took his statement by affidavit that he would serve with impartiality, and argued Commissioner Zinn's qualification at the hearing held by the Court on the Motion of the condemnees to reinstate the jury.

5. The Trial Court denied the condemnees' Motion to reinstate the jury and issued an Opinion relying on facts that were refuted by the witness for the United States as to the number of cases to come before the Court. The evidence before the Court by the witness for the United States was that there would be no more than five condemnation actions

filed and tried by the U.S. District Court. The properties being condemned were within sight of the highway, about fifty miles from the U.S. Federal Courthouse, vested water rights were taken from both the Howells and the Truitts, the properties taken were portions of larger ranches that were ordinary in the sense of New Mexico ranching, along with the water rights that were taken, and the other appurtenances to the real property taken in fee simple and that there would be fee simple properties remaining in each ranch after the taking. The sole basis for the total taking appraisal by the United States' appraisal witnesses was based on instructions to them by the U.S. Bureau of Reclamation.

7. The Commission, as appointed, did not make a jury view, relied on the extensive photographs that were provided

at trial to describe the properties and refused a tender of an extensive 16mm showing of the Howell ranch, finding it unnecessary.

8. The Howells presented evidence to the Commission, of damages from the taking of the fee simple lands taken, the water rights taken, the pecan trees taken, the caliche beds taken, the water sales taken, the use of the irrigation waters to irrigate lands beyond that appurtenant to the water rights taken, the loss of livestock grazing permits, the loss of leases and the loss of leasehold improvements based upon their fair market value. The Truitts presented evidence of the taking of fee simple lands, vested water rights used for stock grazing, and access to the Pecos River for watering their livestock, the loss of leasehold improvements, including watering

facilities and fences, the loss of grazing permits and livestock leases based upon their fair market value. Both the Howells and the Truitts presented evidence of damages to the remaining fee simple lands and the appurtenances thereto as livestock permits and grazing leases along with the cost to cure the loss of watering facilities in the Truitt case. These appraisals were based upon the fair market value of the Howell property and of the Truitt property before the taking and the fair market value of the Howell property and of the Truitt property after the taking, subtracting the two to obtain just compensation. Also testified to by the Howells and the Truitts were the annual cycle and the lifecycle of a cow to show the extensive use of the lands taken in the case of the Howells and in the case of the

Truitts as it related to the remaining lands of the Howells and the remaining lands of the Truitts.

9. The Commission denied these damages in total, without even considering them and awarded the Howells and the Truitts the exact amounts that the United States had offered them on the basis of a total taking of the lands taken as instructed by the Bureau of Reclamation.

BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE

28 U.S.C. 1345.

REASONS FOR GRANTING THE WRIT

1. The United States took real property that had appurtenant to it vested interests in water rights under New Mexico law and both of the condemnees herein were denied their right to a jury trial, as had been properly noticed under the Federal Rules of Civil Procedure. The Lower Court permitted the United States Bureau of Reclamation to instruct the appraisal witnesses for the United States to appraise only the fee simple lands and water rights taken. This brings at issue the following Federal Statutes and decisions of the U.S. Supreme Court. Title 43 U.S.C., Section 383 grants the Bureau of Reclamation the authority to condemn the instant properties for the

Brantley Dam project. This statute requires the United States to not interfere with the laws of the State when taking vested interests in water or water rights. The United States Supreme Court decided that when water rights were taken, that the laws of the State of New Mexico would be used to determine the rights and liabilities of the landowner and appropriator. Title 43 U.S.C. 383 provides in part, the following:

VESTED RIGHTS AND STATE LAWS
UNAFFECTED BY CERTAIN SECTIONS

Nothing in Sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this Title shall be construed as affecting or intending to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of Interior, in carrying out the provisions of such section, shall proceed in conformity with such laws, and nothing in subsection shall in any way affect any right of any state or of the Federal Government or of any land

owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof June 17, 1902 c. 1093 Section 8, 32 Stats.390.(emphasis ours)

The United States Supreme Court interpreted this enabling act in The United States v. Gerlach Livestock Company, 339 U.S. 725 (1949) as follows:

"By directing the Secretary to proceed under the Reclamation Act of 1902, Congress elected not "to in any way interfere with the laws of any State..." relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 32 Stat. 388, 390, Ca. 1093, 43 U.S.C.A., Section 383, F.C.A., Title 43, Section 383.

The U.S. Supreme Court also found at page 742:

"But when a project has been regarded by the highest executive authorities as a reclamation project, and has been carried as such from it's initiation to final judgment for these rights, and Congress, knowing it's history, has given the approvals that it has, we think there is no ground for asking us to hold that the provisions of the Reclamation Act do not apply. " We hold that they do apply and we therefore turn as the Act bids us, to the laws of the State to determine the rights and liabilities of the landowner and appropriator." (emphasis ours)

The U.S. Supreme Court by the above decision and the facts of these two cases, pointed out that the laws of the State of New Mexico shall prevail in establishing the rights and liabilities of the landowner and appropriator which includes the substantive right of having a trial by jury as is further set out under 28 U.S.C. 2072, where Rule 71A(h) is not to abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. The New Mexico Supreme Court, in the case of First State Bank of Alamagordo (Border National Bank of El Paso, Texas, intervenor) v. McNew, et al., 269 P. 56 (N.M. 1928) and Section 72-1-2 N.M.S.A. 1978 as amended, held that the irrigation water rights and stock watering rights taken were vested

interests in water rights appurtenant to the land. Article II, Section 12, New Mexico Constitution and New Mexico Statutes, Section 42-2-11 N.M.S.A. 1978 as amended and Section 42A-1-21 N.M.S.A. 1978 as amended provide a right to a jury trial for condemnation cases in New Mexico.

Section 42-1-10 N.M.S.A. 1978 as amended and Section 42A-1-26 N.M.S.A. 1978 as amended set out that where there is a partial taking of property in eminent domain, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before

and after the taking shall be considered, even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed noncompensable. All of the appraisal witnesses testified that the parcels of land taken were part of a larger parcel, and therefore there was a partial taking, pursuant to those sections of the New Mexico Statute cited hereinabove.

In light of the above Federal Statute, 43 U.S.C. 383 and The United States v. Gerlach Livestock Company, 339 U.S. 725 (1949), and in consideration of the above, the U.S. District Court and the United States Circuit Court of Appeals for the Tenth Circuit, were decisions which decided the federal question in a way in conflict with applicable decisions of this U.S. Supreme Court and should be overturned

granting these condemnees the right of a jury trial and the measure of damages according to the State laws of the State of New Mexico.

The U.S. District Court in it's Memorandum Opinion and Order, filed January 16, 1986 as to the Truitt property, found that the Commissioners properly found that the Defendants' ranch, including the 20 acres condemned, was not an economic unit for the purposes of compensation. There is absolutely no legal support for such a finding that severance damages may only be awarded upon proof of an economic unit. All the evidence was that the sole source of livelihood of the Truitts from the 1940s to the present was the ranch from which the parcel was taken, along with it's water rights. The Court recited in it's opinion and order, substantial evidence to support the

Commissioners' finding that the remaining part of the ranch was not functionally damaged from the severance of the portion taken, when the only evidence before the Court was that it had been functionally damaged and there was absolutely no evidence to the contrary.

2. The District Court and U.S. Circuit Court of Appeals based their decision to deny these condemnees a jury trial on the character and location of the land under Rule 71A(h), Federal Rules of Civil Procedure because of the great number of condemnation cases pending in the Court and because of the expeditious ascertainment and payment of just compensation as contained in the July 30, 1985 filing in the Truitt case and in the January 30, 1985 filing in the Howell case.

The U.S. District Court in it's filing of March 25, 1985 of the Howells, found that this case was one of fourteen currently pending, involving the Brantley Dam and involved one of hundreds of tracts of land which would be acquired by the Federal Government over the life of the project. This same language was relied on by the United States Circuit Court of Appeals, which also include, in many of these cases, severance damages which would need to be determined as well as the value of mineral interests and flowage easements, in such an instance, the appointment of a commission is justified in the interest of justice. The facts before the Court were not those. The witness for the United States had testified upon cross examination, that there would be no more than five condemnation cases including the Truitt and Howell cases

which would come before the U.S. District Court. In the final count, only four cases similar to and including the Truitt and Howell cases ever came before the U.S. District Court. The other fact before the Court was that the property taken was along the U.S. Highway, approximately 50 miles from the Federal District Court, could be seen from the highway and there was severance damage, which was ignored by this U.S. District Court, and that this was a run of the mill New Mexico ranch operation which would always qualify to go before a jury in the State of New Mexico under New Mexico law. The U.S. Tenth Circuit Court of Appeals has considered this question in United States v. Waymire, 302 F.2d. 550, United States v. Wallace, 201 F. 2d. 65 and United States v. Theimer, 199 F. 2d. 501. These cases generally outline the criteria as seen

by the U.S. Circuit Court of Appeals as being as follows:

> (1) Lack of uniformity of awards in large projects involving numerous acquisitions with a multitude of different kinds of property and property rights being taken and complex evaluation formulas;
>
> (2) Hardship on a jury travelling to view the premises; and
>
> (3) Excessive burden of the Court to try numerous cases before a jury.

The way the Commission awarded, was to award every condemnee exactly what the United States offered them. There is no evidence as to any complexity of these cases either produced or addressed in this action. As for (2), hardship on the jury travelling to view the premises, the lands taken were in view from the highway. Access to the remainder of these ranches would have been available by travelling on reasonably well improved country roads. The Commission did not view the

property, found the photographs presented sufficient to make a decisio and turned down the tender of an extensive 16 mm. movie made of the Howell ranch. The U.S. Supreme Court has expressed in LaBuy v. Howes Leather Company, 352 U.S. 249 (1956), that court docket congestion was not such an exceptional circumstance as to warrant reference to a master under Ru 53, F.R.C.P.. This U.S. Supreme Court decision and the above recited facts should reflect the abuse of discretion of the U.S. District Court in selectin a commission as it did in the Truitt a the Howell cases under Rule 71A(h) F.R.C.P.. This Court should reverse a remand the Tenth Circuit Court of Appeals' decision, sending it back to the U.S. District Court, for a jury trial, pursuant to Rule 71A(h), under the facts of the instant case. The

decision of the District and Circuit Court decided a federal question in a way in conflict with applicable decisions of this Court, including Rule 71A(h), Federal Rules of Civil Procedure and in LaBuy v. Howes Leather Company, 352 U.S. 249 (1956), supra.

3. The U.S. District Court appointed and re-appointed a Commission without factual evidence of exceptional circumstances under Rule 71A(h) F.R.C.P. Later in an evidentiary hearing, there was evidence before the Court of there being only five Brantley Dam condemnation cases to come before the Court. The statements of Commissioner Zinn should have disqualified him. The United States Attorney in presenting Zinn's case before the Court prejudiced these condemnees. The Court did not notify the condemnees of the qualifications of the proposed

Commissioners. Not only could there be no unusual circumstances found in these cases, but the letter and spirit of Rule 71A(h) F.R.C.P. was violated in appointing these Commissioners. Condemnees determined after this case was tried that the Commissioners were not qualified to sit. Not one of them had any experience with the value of ranch properties, the operation of a ranch, the knowledge of a lifecycle of a cow to show the interdependency of the various real estate properties that were necessary to sustain the cow during its annual or lifecycle, nor had any of them ever sold a ranch property. The condemnees were prevented from examining the Commissioners' qualifications, yet the U.S. District Court allowed the U.S. Attorney and Commissioner Zinn to act on behalf of Zinn when he was challenged.

Rule 71A(h) was adopted by the Supreme Court to prevent this type of occurrence. The Court of Appeals for the Tenth Circuit failed to address this issue. Once there was an objection to Zinn and evidence presented on his apparent bias and lack of qualifications the Trial Court had an obligation to present Zinn to defend that objection, personally and through other counsel than the U.S. Attorney. Rapp v. Van Dusen, 350 F. 2d 806 is a very appropriate case that demonstrates the bias presumed from ex-parte representation of the challenged judge by counsel for one of the party litigants. Zinn should have been disqualified on that basis alone.

The U.S. District Court and the U.S. Court of Appeals did decide a federal question of law in a way in

conflict with applicable decisions by this U.S. Supreme Court it its issuing Rule 71A(h), Federal Rules of Civil Procedure as it did in the first instance and under LaBuy v. Howes Leather Company, 352 U.S. 249 (1956), supra.

CONCLUSION

For the reasons stated heretofore the petition for writ of certiorari should be granted.

Respectfully submitted:

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APPENDIX

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA v. 20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, and WILMA DEAN TRUITT, et al. (Tract 49), Defendants-Appellants.	)	No. 86-1387
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. 408.75 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, and HOWARD HOWELL, et al. (Tract 52), Defendants-Appellants	)	No. 86-1423

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 86-2906
10.2 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, and HART GREENWOOD, et al,	)	
Defendants-Appellants.	)	

ORDER AND JUDGMENT

Before MCKAY, MCWILLIAMS, and MOORE, CIRCUIT JUDGES.

This order addresses three consolidated cases: United States v. 20 Acres of Land, United States v. 408.75 Acres of Land, and United States v. 10.2 Acres of Land. All three cases involve eminent domain actions brought by the United States to condemn land in Eddy County, New Mexico, for the Brantley Dam Project.

The district court, here, appointed a commission to determine just compensation.

In condemnation proceedings in which a commission has been appointed by the trial court, the standard of review for this court is whether the trial court abused its discretion in appointing a commission to determine just compensation. United States v. Theimer, 199 F.2d 501, 503 (10th Cir. 1952). We find that the district court did not abuse its discretion in the appointment of the commission.

Appellants argue that they are entitled to a jury trial. "It has long been settled that there is no constitutional right to a trial by jury in eminent domain proceedings." United States v. Reynolds, 397 U.S. 14, 18 (1970). See also Bauman v. Ross, 167 U.S. 548, 593 (1897). However, under Rule 71A(h) of the Federal Rules of Civil Procedure,

> [A]ny party may have a trial by jury of the issue of just compensation by filing a demand therefor * * *, unless the court

> in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

(Emphasis added). See United States v. Delaware, Lackawanna & W.R.R., 264 F.2d 112, 115 (3d Cir.), cert denied, 361 U.S. 819 (1959) ("From the wording of the rule it is apparent that the choice [of jury o commission] is vested in the discretion o the court."). This court has held that a plaintiff in an eminent domain proceeding is entitled to a jury "unless, due to the character, location, or quantity of the property to be condemned, or some other reason in the interest of justice, the court in the appropriate exercise of its sound discretion appoints a commission." United States v. Waymire, 202 F.2d 550, 5 (10th Cir. 1953). See also United States

v. Wallace, 20 F.2d 65 (10th Cir. 1952), United States v. Theimer, 199 F.2d 501 (10th Cir. 1952). In these consolidated cases, the district court stated in its memorandum order:

> [T]his case is one of fourteen currently pending involving the Brantley Dam and involves one of hundreds of tracts of land which will be acquired by the federal government over the life of the Project. In many of these cases severance damages will need to be determined, as well as the value of mineral interests and flowage easements. In such an instance appointment of a commission is justified in the interests of justice.

Addendum to Brief, Truitt Memorandum Opinion of March 25, 1985 ("3/25/85 Opinion") Tab D, at 1-2, 3. The circumstances which justified appointing a commission in Wallace and Waymire existed in the cases now before us.

Appellants next argue that the district court abused its discretion in not disqualifying Commissioner Zinn. The

question whether a commissioner should be disqualified "is a matter for the exercise of discretion by the district judge, unless actual bias has been demonstrated beyond reasonable possibility of disagreement." United States v. Certain Parcels of Land, 384 F.2d 677, 681 (4th Cir. 1967). See also United States v. Lewis, 308 F.2d 453, 457 (9th Cir. 1962). Appellants made only vague allegations concerning bias on the part of Commissioner Zinn. The district court did not abuse its discretion in denying appellant's motion to disqualify the Commissioner.

Appellants' argument that they are entitled to severance damages is also without merit. The standard of review articulated by this court is that "the appellate court reviews the determination of a district court in condemnation proceedings only to determine '. . .whether

proper legal standards were applied in resolving the issue of just compensation and whether any supplemental findings of the district court were clearly erroneous.'" United States v. 179.26 Acres of Land, 644 F.2d 367, 369 (10th Cir. 1981) (citing United States v. Brinker, 413 F.2d 733 (10th Cir. 1969)). The district court's affirmance of the Commissioner's finding that appellants were not entitled to severance damages was not clearly erroneous.

There is a two-tiered test for determining whether a party is entitled to severance damages: First, claimant must establish that the entire property constituted an "integrated use." Second, claimant must show loss of market value to the remaining parcel. Cole Investment Co. v United States, 258 F.2d 203, 204-05 (9th Cir. 1958). The landowner must first

demonstrated "unity of ownership" of the land taken and the remaining parcels. United States v. 87.30 Acres of Land, 430 F.2d 1130, 1133 (9th Cir. 1970). Appellants here did not demonstrate unity of ownership or integrated use. Additionally, appellants failed to prove any loss in the market value of the parcel remaining after the taking. Therefore, the district court correctly held that the Commissioner's finding that appellants were not entitled to severance damages was not clearly erroneous.

Appellants challenge sixteen of the twenty-seven instructions given to the commission by the district court, but failed to establish that any of the alleged errors in the commission instructions prejudiced them. Thus, there are no grounds for reversal. The challenged instructions, taken facially as a whole, do

not constitute reversible error.

The district court judgment is AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge

FEBRUARY 13, 1989

Before Honorable Monroe G. McKay, Honorable Robert H. McWilliams and Honorable John P. Moore, Circuit Judges.

UNITED STATES OF AMERICA	)	
	)	Nos. 86-1387
v.	)	86-1423
	)	86-2906
20 ACRES OF LAND, etc., et al.,	)	
	)	
Defendants-Appellants.	)	

Appellants' motion for rehearing is denied by the hearing panel. 10th Cir.R. 35.2.1.

ROBERT L. HOECKER, Clerk

By _____
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1272HB

20 ACRES OF LAND MORE OR LESS IN EDDY COUNTY, STATE OF NEW MEXICO, AND WILMA DEAN TRUITT, et. al., and ALL UNKNOWN OWNERS OR CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

AMENDED ORDER APPOINTING COMMISSIONERS

After considering the record in this case and after being fully advised, this Court concludes and finds that the issues of just compensation for the taking of the land in the above case should be determined by a Commission of three persons appointed by the Court pursuant to the terms of Rule 71A(h) of the Federal Rules of Civil Procedure. This action should be taken by the Court because of the character and

location of the land, and because a great number of condemnation cases are pending in this Court, and because the expeditious ascertainment and payment of just compensation is required by Rule 71A(h), so that the administration of justice in this action will thereby be advanced.

IT IS THEREFORE ORDERED that Messers. Frank B. Zinn, Curtis C. Graham and Ms. Shirlea Taylor, be appointed as Land Commissioners and determine the issue of just compensation for the taking of said land. Mr. Zinn shall continue as Chairman.

IT IS FURTHER ORDERED that said Commission shall possess and exercise all powers that may be conferred upon it by the terms and tenor of Rule 71A(h) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the Commission shall hold hearings at such times and places as it may deem necessary

and proper, or as directed by the Court, and that it shall notify the parties claiming an interest in said tracts, or their counsel of record, through the Clerk of this Court, at least fifteen (15) days in advance as to the time and place of any such hearing.

IT IS FURTHER ORDERED that each Commissioner shall receive, for services rendered in connection with their duties, the sum of $50.00 per hour, which total pay for one calendar day should not exceed $252.96 as per Pay Order 84-1 of the Director of the Administrative Office of the U.S. Courts, plus the subsistence and mileage allowances, when appropriated, as authorized for federal employees.

UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1393HB

408.75 ACRES OF LAND MORE OR LESS IN EDDY COUNTY, STATE OF NEW MEXICO, HOWARD HOWELL, et al. and ALL UNKNOWN OWNERS OR CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

AMENDED ORDER APPOINTING COMMISSIONERS

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_____

UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1272HB

20 ACRES OF LAND MORE OR LESS IN EDDY COUNTY, STATE OF NEW MEXICO, AND WILMA DEAN TRUITT, et. al., and ALL UNKNOWN OWNERS OR CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

SECOND AMENDED ORDER APPOINTING COMMISSIONERS

After considering the record in this case and after being fully advised, this Court concludes and finds that the issues of just compensation for the taking of the land in the above case should be determined by a Commission of three persons appointed by the Court pursuant to the terms of Rule 71A(h) of the Federal Rules of Civil Procedure. This action should be taken by the Court because of the

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IT IS FURTHER ORDERED that each Commissioner shall receive, for services rendered in connection with their duties, the sum of $50.00 per hour, which total p for one calendar day should not exceed $263.36 as per Memorandum of William E. Foley;, Director of the Administrative Office of the U.S. Courts dated January 2 1985, plus the subsistence and mileage allowances, when appropriated, as authorized for federal employees.

UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1393HB

408.75 ACRES OF LAND MORE OR LESS IN EDDY COUNTY, STATE OF NEW MEXICO, HOWARD HOWELL, et al. and ALL UNKNOWN OWNERS OR CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

SECOND AMENDED ORDER APPOINTING COMMISSIONERS

After considering the record in this case and after being fully advised, this Court concludes and finds that the issues of just compensation for the taking of the land in the above case should be determined by a Commission of three persons appointed by the Court pursuant to the terms of Rule 71A(h) of the Federal Rules of Civil Procedure. This action should be taken by the Court because of the

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UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1272HB

20 ACRES OF LAND MORE OR LESS IN EDDY COUNTY, STATE OF NEW MEXICO, AND WILMA DEAN TRUITT, et. al., and ALL UNKNOWN OWNERS OR CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on defendant's motion to reinstate the jury. The court, having considered the motion, heard the parties and reviewed all the evidence, concludes that the motion is not well taken and should be denied.

This matter is a condemnation action for which Rule 71A of the Federal Rules of Civil Procedure is applicable. Defendants made a timely jury demand. The court

nevertheless appointed a Commission to hear the matter. Defendants now seek to reinstate the jury.

This case is one of fourteen currently pending condemnation actions involving the Brantley Dam and Reservoir Project. The government estimates that the project will involve 41,300 acres, with over 12,000 of that being privately owned land. The varying interests which the United States will seek to acquire in private acreage includes fee interests, mineral estates and flowage easements. The United States projects that nearly 300 separate tracts will be acquired before the project is completed. Only 67 have been secured either through sale or condemnation to date. The size of the tracts to be acquired also vary, the largest being over 3,000 acres and the smallest apparently

being individual lots in an undeveloped subdivision.

Rule 71A(h) of the Federal Rules of Civil Procedure stats in part:

> ...any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

The Tenth Circuit has taken the position, that a party to a condemnation action is entitled to a jury unless exceptional or extraordinary circumstances are present. United States v. Theimer, 199 F.2d 501 (10th Cir. 1952); United States v. Waymire, 202 F.2d 550 (10th Cir. 1953). In Waymire, the Tenth Circuit found that a condemnation action involving five ranches

and several small tracts presented an exceptional circumstance which justified the appointment of a commission. The Court also considered the fact that the property was located more than one hundred and fifty miles from the courthouse and that the land to be taken varied in kind, character and adaptability. The court noted that severance value, flowage easement value and value of improvements needed to be considered in the award of just compensation.

Many of the same factors are present in this case. This particular case involves only one tract of land. However, as has been noted, this case is one of fourteen currently pending involving the Brantley Dam and involves one of hundreds of tracts of land which will be acquired by the federal government over the life of the Project. In many of these cases severance

damages will need to be determined, as well as the value of mineral interests and flowage easements. In such an instance appointment of a commission is justified in the interests of justice. "Use of a commission is appropriate in a case such as this one, which involves 'large areas held by many small landowners.'" United States v. 5.00 Acres of Land,, 673 F.2d 1244 (11th Cir. 1982); see also, United States v. 561.14 Acres of Land, 203 F.Supp. 673 (W.D. Ark. 1962); United States v. 186.82 Acres of Land, 207 F.Supp. 395 (W.D. Penn. 1962). In fact, in making provisions for commissions to hear condemnation actions under Rule 71A(h), this type of situation was specifically contemplated by the Advisory Committee. Notes of Advisory Committee on Rules, Supplementary Report.

Defendants in their motion to reinstate the jury and again at the hearing

on this motion raised an objection to the appointment of Frank Zinn as Chairman of the commission which will hear this case. The court will treat the objection as a motion to disqualify Frank Zinn.

Commissioners are appointed by the court. The court need not consult the litigants as to the membership of the commission which will hear their dispute. Furthermore, disqualification of a commissioner for bias or conflict of interest is a matter for the exercise of discretion by the district judge, unless actual bias has been demonstrated beyond reasonable possibility of disagreement. United States v. Lewis, 308 F.2d 453 (9th Cir. 1962); United States v. Certain Parcels of Land Located in Fairfax County, 384 F.2d 667 (4th Cir. 1967); United States v. 5.00 Acres of Land, 673 F.2d 1244 (11th Cir. 1982). In the present case, no bias

or conflict of interest has been demonstrated by the defendants.

Defendants have submitted no admissible evidence of actual bias or conflict of interest. Rather, defense counsel, at the hearing, proceeded to attack Chairman Zinn through blatantly inappropriate means. Defense counsel took two of Chairman Zinn's remarks regarding the commission's instructions in a previous Brantley Dam case, United States v. 1,680 Acres of Land, Civ. 83-148 and 83-1480, completely out of context to imply misfeasance on Chairman Zinn's part in that case. The allegations of misfeasance are totally unfounded. The transcript of the prior proceedings reveal that under the theories of compensation advanced in that case Chairman Zinn's remarks were proper comments on the instructions to the commission.

Defense counsel, in addition, relied on hearsay from the defendant's attorney in the above mentioned case, who indicated dissatisfaction with the commission, to support defendants' claim of bias and conflict of interest. The hearsay was submitted as a proffer. No actual evidence of either the existence of attorney dissatisfaction or the grounds for the attorney's complaints was offered. Neither the defendant nor defense counsel in United States v. 1,680 Acres of Land have made any representation to this court of any impropriety on Chairman Zinn's part. If defense counsel in that proceeding had cause to complain, the proper course would have been to bring it to the court's attention.

Finally, defense counsel attempted to establish that Chairman Zinn had somehow improperly offered his services as an

arbitrator at a seminar he attended. Once again, defense counsel submitted no evidence that would substantiate this allegation. Defense counsel merely related what was told to him by some undisclosed third persons. Nor has defense counsel established how Chairman Zinn's conduct, if it occurred at all, was improper or gave rise to a conflict of interest.

Defendants' allegations of misfeasance, bias and conflict of interest are not substantiated by a shred of admissible evidence. Unsubstantiated allegations of misfeasance, bias and conflict of interest are certainly not sufficient for the court to exercise its discretion in disqualifying Chairman Zinn from hearing this case.

Now, therefore,

IT IS BY THE COURT ORDERED that defendant's jury demand is hereby stricken,

and defendant's motion to reinstate the jury is denied.

_____

Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1393HB

408.75 ACRES OF LAND MORE OR LESS IN EDDY COUNTY, STATE OF NEW MEXICO, HOWARD HOWELL, et al. and ALL UNKNOWN OWNERS OR CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on defendant's motion to reinstate the jury. The court, having considered the motion, heard the parties and reviewed all the evidence, concludes that the motion is not well taken and should be denied.

This matter is a condemnation action for which Rule 71A of the Federal Rules of Civil Procedure is applicable. Defendants made a timely jury demand. The court

nevertheless appointed a Commission to hear the matter. Defendants now seek to reinstate the jury.

This case is one of fourteen currently pending condemnation actions involving the Brantley Dam and Reservoir Project. The government estimates that the project will involve 41,300 acres, with over 12,000 of that being privately owned land. The varying interests which the United States will seek to acquire in private acreage includes fee interests, mineral estates and flowage easements. The United States projects that nearly 300 separate tracts will be acquired before the project is completed. Only 67 have been secured either through sale or condemnation to date. The size of the tracts to be acquired also vary, the largest being over 3,000 acres and the smallest apparently

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Many of the same factors are present in this case. This particular case involves only one tract of land. However, as has been noted, this case is one of fourteen currently pending involving the Brantley Dam and involves one of hundreds of tracts of land which will be acquired by the federal government over the life of the Project. In many of these cases severance

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Defendants in their motion to reinstate the jury and again at the hearing

on this motion raised an objection to the appointment of Frank Zinn as Chairman of the commission which will hear this case. The court will treat the objection as a motion to disqualify Frank Zinn.

Commissioners are appointed by the court. The court need not consult the litigants as to the membership of the commission which will hear their dispute. Furthermore, disqualification of a commissioner for bias or conflict of interest is a matter for the exercise of discretion by the district judge, unless actual bias has been demonstrated beyond reasonable possibility of disagreement. United States v. Lewis, 308 F.2d 453 (9th Cir. 1962); United States v. Certain Parcels of Land Located in Fairfax County, 384 F.2d 667 (4th Cir. 1967); United States v. 5.00 Acres of Land, 673 F.2d 1244 (11th Cir. 1982). In the present case, no bias

or conflict of interest has been demonstrated by the defendants.

Defendants have submitted no admissible evidence of actual bias or conflict of interest. Rather, defense counsel, at the hearing, proceeded to attack Chairman Zinn through blatantly inappropriate means. Defense counsel took two of Chairman Zinn's remarks regarding the commission's instructions in a previous Brantley Dam case, United States v. 1,680 Acres of Land, Civ. 83-148 and 83-1480, completely out of context to imply misfeasance on Chairman Zinn's part in that case. The allegations of misfeasance are totally unfounded. The transcript of the prior proceedings reveal that under the theories of compensation advanced in that case Chairman Zinn's remarks were proper comments on the instructions to the commission.

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Finally, defense counsel attempted to establish that Chairman Zinn had somehow improperly offered his services as an

arbitrator at a seminar he attended. Once again, defense counsel submitted no evidence that would substantiate this allegation. Defense counsel merely relate what was told to him by some undisclosed third persons. Nor has defense counsel established how Chairman Zinn's conduct, i it occurred at all, was improper or gave rise to a conflict of interest.

Defendants' allegations of misfeasance, bias and conflict of interest are not substantiated by a shred of admissible evidence. Unsubstantiated allegations of misfeasance, bias and conflict of interest are certainly not sufficient for the court to exercise its discretion in disqualifying Chairman Zinn from hearing this case.

Now, therefore,

IT IS BY THE COURT ORDERED that defendant's jury demand is hereby stricken,

and defendant's motion to reinstate the jury is denied.

_____

Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1272HB

20 ACRES OF LAND; (Brantley Dam Project), WILMA DEAN TRUITT,

Defendants.

REPORT OF LAND COMMISSIONERS

To: The Honorable Howard C. Bratton, Chief Judge

From: Frank B. Zinn,
Curtis C. Graham,
Sherlea Taylor,
Land Commissioners.

Acting for the Court by authority of the appointment made pursuant to the Federal Rules of Civil Procedure, Rule 71A(h), 28 U.S.C.A., and the Court's instructions filed in this proceeding in condemnation, hearing was held to determine an amount of money to be awarded as just

compensation to the defendant land owner for the property taken by the Government.

The Commissioners respectfully submit to the Court, their findings and determinations.

1. Hearing Place and Dates: United States District Court Federal Building, Roswell, New Mexico, June 24th and 25th, 1985.

2. Appearances: For Plaintiff: Assistant United States Attorney, Raymond Hamilton. For Defendant: James L. Dow of Dow, Feezer & Williams P.A., Carlsbad, N.M. and Richard V. Gose, Santa Fe. N.M.

3. Basic Hearing Information: The property is taken in fee for the United States Department of Interior, Bureau of Reclamation, Brantley Project. A detailed description of the land, designated as tract 49, is contained in schedule "A" attached to the Complaint. The taking is

of the entire 20 acres. The tract taken is an unimproved rectangle with one corner extending into the Pecos river. At one time it was a contiguous part of the defendant Truitt's ranch, a cattle raising enterprise, consisting of a mix of fee land, state land leases, Federal leases totalling approximately 11,446 acres. After December 31, 1983, portions of the Federal land leased from the Bureau of Reclamations were no longer held by the Truitt's and the subject tract, the 20 acres was no longer a contiguous part of the ranch. The ranch is located about 14 miles northwest of Carlsbad, in central Eddy County, New Mexico. It lies on both sides of the main north - south highway, U.S. 285. The 20 acre tract lies within the land area to be inundated when the dam is completed. The owner of the land is

Wilma Dean Truitt. The date of taking is August 13, 1984.

4. Rulings and Stipulations: The parties stipulated they had agreed upon an amount to be awarded the defendant for the mineral rights acquired in the 20 acres and that the Commission need not make any determination in that regard.

Plaintiff objected to the reception of testimony by the Commission of the landowner, Mrs. Truitt and the appraiser Mr. Witt on the grounds that they each included in their opinions of before and after valuations, elements of loss proximately resulting from the non-renewal of the government's lease as to 3538 acres of grazing land. The Commission Chairman ruled that the testimony would be received. A motion to strike the testimony on similar grounds was also denied.

5. Summary of Evidence: Mrs. Wilma Dean Truitt, the land owner and defendant testified about the history of the acquisition of the ranch. The several grazing leases and the central fee lands were acquired at one time. The 20 acre parcel being condemned was a later acquired purchase. The pastures were so divided that the livestock placed into the eastern part of the ranch could traverse freely to reach the Pecos river to water, both on the 20 acre piece and at other points. The loss of the 3538 acres as a result of the non-renewal of the Bureau of Reclamation lease as to that portion, comprising most of the ranch on the east side of the highway, left only the 20 acre parcel as a watering location. There were no wells or tanks on other land in the possession or ownership of Mrs. Truitt on the east side of the highway. She does have stock water

resources on the west side of the highway. Mrs. Truitt said she would need to provide stock water on the east side of the highway to utilize the grazing land remaining to her there. She said that the 20 acre piece was an integral part of her ranching operation even after the isolation of the parcel affected by the loss of the 3538 acres.

Mrs. Truitt gave an opinion that the fair compensation for this net taking must be the before and after value of the ranch based upon livestock carrying capacity. She estimated a gross value before the taking of $287,500. This was calculated as being based upon a carrying capacity of 115 animal units. She placed a worth of $2,500 per animal unit founded upon comparable sales of other ranches she knew about. She estimated that after the taking the carrying capacity of the ranch was reduced

to 75 animals. Mrs. Truitt estimated the worth of an animal unit after the taking to be $1,500. This loss of worth was explained as being caused by the changes in the ranch and the method of operation brought about because of the loss of the land taken. Using the two figures, Mrs. Truitt multiplied them to reach the sum of $112,500. This was given as her opinion of the, after taking, market value of the ranch. By subtracting the before and after values she reached her opinion of fair compensation of $175,000.

Mrs. Truitt provided a written tabulation she had prepared explaining her method of arriving at the livestock unit values. (Defts Ex. P) She had also prepared a compilation of the land and improvements upon the ranch setting out values given to the several items. A part of this exhibit also set out figures for

certain losses caused by the taking, such as loss of fences and restoring stock water to the east side pasture. (Defts Ex. R.) Mrs. Truitt explained that the loss of access to the highway culverts as underpasses for livestock to travel between the ranch areas would require extra workers to move the cattle.

Mrs. Truitt acknowledged that she had no water rights appurtenant to the 20 acre parcel. She said that as to all the remainder of the ranch, both fee and under lease it was in her ownership or control and that it was all being used as one livestock raising operation.

Correspondence from the Bureau of Reclamation Pecos River Project manager informing Mrs. Truitt through her attorney of the changes to be made in the acreage under lease and of the dates when these changes were to be effective were put into

evidence through Mrs. Truitt. (Defts. Ex. A, F & D) These reflect the loss of the 3538 acres and the notice to end any occupancy after Nov. 1, 1984.

Letters from the Bureau of Land Management to Mrs. Truitt adjusting the grazing preference and allotment boundaries were put into evidence by defendant. (Defts Ex. B & E) This ordered an adjustment of boundary to reflect the loss of the 3538 acres and a reduction in grazing permitted from 114 cows and 1 horse to 74 cows and 1 horse.

Mr. Jim Witt of Carlsbad, New Mexico, a professional appraiser and rancher, testified for defendant. He related his extensive experience and education in appraising property and in ranching. Mr. Witt had appraised the Truitt ranch for the purpose of this condemnation suit. He gave his testimony and also supplied a copy

of his report to defendant's attorneys of his opinion. (Defts Ex. Q)

Mr. Witt had compiled information about sales of other ranch properties in the area of the Truitt ranch. He had selected a few which he deemed comparable and had derived an opinion of the fair market value of the Truitt ranch by converting market data to livestock carrying capacity unit values. His opinion was that before the taking, the Truitt ranch had an animal unit, year long carrying capacity of 115. He valued these at $2,400. each which he multiplied out to get his before market value of $276,000. His after the taking value was based upon an after carrying capacity of 72 animal units. These he valued at $1,912. each which he multiplied to reach an after market value of $137,664. Then he

expressed his opinion of just compensation as the difference, $138,336.

Mr. Witt explained that the lesser value of each animal unit after the taking was because of the greater costs that would accompany the operation of the ranch after it had been modified as a result of the taking of the 20 acres by the government. Within his report of appraisal, (Defts Ex Q) is a page which shows these extra costs tabulated and computations of the change in per animal unit values. Part of the extra cost arises from loss of ability to trail cattle through the highway culverts that were available when the 3538 acres under lease from the Department of the Interior was still a part of the ranch. To get animals from west to east now must be done by other means. The one most likely method Mr. Witt and Mrs. Truitt described was to have extra hands control traffic and move

the animals over the highway. Mr. Witt estimated this would cost $400. each year based on two crossings at $200. each.

Another element of expense was to provide water to the livestock on the east side pastures. This was explained as necessary to replace the watering source at the Pecos river, lost with the taking of the 20 acres. Mr. Witt's proposed solution and that suggested by Mrs. Truitt was to transport water from an existing well on the west side of the highway by way of a pipeline under the highway. The details of this project were itemized in his testimony and in a page of his report, (Defts Ex. Q) by Mr. Witt. The gross cost of this work was estimated as $29,354.80. He also estimated an added expense for electrical power to do the pumping of $480. per year.

Mr. Witt acknowledged that he had concluded that the fair market value of the

20 acres alone without regard to consequences of the taking upon the ranch remaining was $11,000.00. It was his opinion that the 20 acre parcel taken and the remaining ranch constituted an economic unit. It was his opinion that the loss of the 20 acres caused severance damage to the remainder that should be compensated by evaluating the property as a whole, with the difference between the before and after values being the true measure of just compensation.

The defendant put into evidence abstracted copies of the deed records of Eddy County relating to two conveyances. No plat or testimony was presented to explain the documents. The first, (Defts. Ex. S), was a part of an abstract of title and the page that is included between the cover and the abstractor's certificate records the United States Patent to Charles

B. Eddy, dated Jan. 19, 1889. The land conveyed was NW1/4NE1/4 of Sec. 28; SW1/4SE1/4; E1/2SW1/4 of Sec. 21 Twp. 20 S. Ranch 26 East N.M.P.M. The second, (Defts Ex. T) is seven pages of handwritten script, photocopied in reduced form from the county deeds books. This is a warranty deed of many elements of what appeared to have been the irrigation works of the Pecos Irrigation Company and a great many tracts of land, to the United States of America. On the fourth page of this deed one piece listed as "N1/2 of S1/2" Sec. 27 Twp 20 Rge 26 E. N.M.P.M. Defendant put into evidence the tract plat from the declaration of taking. (Defts. Ex D-1) From this plat and the description of the land taken in this proceeding: "Tract 49 Fairchild Farms Tract no 784 located in the NW1/4SW1/4 Sec. 27, T 20 S R 26 E, N.M.P.M. Eddy County, New Mexico, Area = 20.00

acres+/-." It appears the 20 acres falls within the description in the deed to the United States. Otherwise, Defts Ex T remains a puzzle.

The defendant put into evidence a number of photographs (Defts. Exhibits F thru N, incl. and L-2, L-3 and L-5 thru L-8 incl.) These depict scenes at various locations on the Truitt ranch and were used in illustrating her testimony by Mrs. Truitt. Defendant also put in evidence the 1985 grazing lease from the United States Bureau of Reclamation. (Defts Ex D)

The Plaintiff, the United States put into evidence the 1984 grazing lease from the United States Bureau of Reclamation to the defendant. (Pltfs Ex 9)

The Plaintiff, United States put into evidence a map of the Brantley project area along the Pecos River. (Pltfs Ex. 2) This map was used to illustrate his testimony by

Mr. Thomas L. Chapman, the Realty Officer of the U.S. Dept. of Interior, Bureau of Reclamation, Pecos River Projects Office, Carlsbad, New Mexico. Mr. Chapman explained the relationship and the Brantley project pans for the land being taken from the Truitt ranch of this proceeding.

The plaintiff, United States put into evidence two other maps. One is a before Dec. 31, 1983, portrayal of the ranch, the other as it appeared without the 3538 acres. These were used by several witnesses to illustrate their testimony. (Pltfs Ex. 4 and 6). The maps show the various tracts of fee land, the state leases, the B.L.M. leases and the leases from the Bureau of Reclamation both before Dec. 31, 1983 and after that date. The 20 acre site is shown as a contiguous part of the eastern pasture before Dec. 31, 1983 and isolated afterward. The maps also show

the highway relocation and the dam site, as changes resulting from the Brantley project.

The plaintiff, the United States presented the testimony of Charles R. Keever, MAI of Gillentine & Keever, Inc., Real Estate Appraisers, Santa Fe, New Mexico. Mr. Keever had made an appraisal for the purpose of this proceeding. A report of his appraisal is also in evidence. (Pltfs Ex. 1 & 1-A)

Mr. Keever considered the 20 acre parcel as a singular tract without regard to its former (before December 31, 1983) connection to the remainder of the Truitt ranch. He was of the opinion that the tract had as its highest and best use, development for rural homesites of a recreational nature. He had studied the sales of property in the area and by using sales he felt comparable, and with some

adjustments arrived at an opinion of fair market value of $550. per acre or $11,000. for the entire tract taken.

Mr. Keever said that he did not consider the 20 acres to have unit of use with the remaining ranch as of the date of taking.

Mr. Keever preceeded his testimony with a review of his education and experience in the work of real estate appraisal. In his report there is set out a detailed resume of that same data. (Pltfs Ex. 1 pg 24)

Mr. Keever was of the opinion that as of August 30, 1984 the fair market value of the property taken was $11,000.

6. Commission Determination: The Commission finds that the highest and best use of the property taken is for development as rural recreational homesites. There has not been a partial

taking. The parcel taken and the remaining land of the defendant did not constitute one unit or tract as of the date of taking. The fair market value of the tract taken is $11,000. as of the date of taking and an award of that sum would be just compensation to the defendant.

7. Discussion of Testimony and of the Commission Findings: Within the instructions of the Court, particularly, instruction 14, the Commission is obliged to determine whether the facts of the taking constituted a partial taking of defendant's property.

The land owner contends that the acquiring of the 20 acre parcel was such a partial taking. The plaintiff, the United States contends that the taking was of a singular parcel not a part of a larger economic unit.

After loss of the 3538 acres, the 20 acre parcel was left unconnected to any land held by Mrs. Truitt. There was a gap of about 12,000 feet to the nearest part of the eastern pasture. This was the condition as of August 30, 1984, the taking date, and this had been the condition since the end of 1983.

The defendant contends that because of the lands acquired by the United States from the Pecos Irrigation Company having included the tract taken as well as the connecting lands which had ben in the grazing lease before the end of 1983, there arose as a right-of-way over the government's land an easement to defendant to reach her isolated tract. The Commission is unable to discern the facts contended for from the evidence. The two deeds in evidence when compared to the maps fail to establish any solid pathway or any

completely common tract so as to give rise to a way of necessity argued for by defendant. This has a bearing in deciding the question of unity of use. The instruction, no 14 says contiguousness is only one element or factor to be considered.

Mrs. Truitt had access for the 20 acres, by lease until Jan. 1, 1984 and by permission until November 1, 1984 over the Bureau of Reclamation Land. She testified that she operated the ranch as a unified livestock raising operation, with water for the stock grazing in the eastern pasture reached by them at the river at the 20 acres and elsewhere. This is the way things were as a practical matter even after the date of taking. For the purpose of deciding what is a partial taking, there must be some distinction made as between what was actually happening and what Mrs.

Truitt had a right to do. Except for the permissive use by the Bureau of Reclamation Pecos River Projects Manager, Mrs. Truitt had lost the effective use of her 20 acre tract as a part of the ranch when her lease no longer included the 3538 acres of land connecting the parcel to the rest of her ranch. To find a single economic unit, or a sue or potential use for the 20 acres and the ranch remaining as of August 30, 1984, without including the 3538 acres is not reasonable. The reduction in livestock units imposed by the Bureau of Land Management followed the reduction of the grazing land under lease from the Bureau of Reclamation. This reduction in livestock carrying capacity is the principal loss of value to the after the taking market value opinions expressed by Mrs. Truitt and Mr. Witt. To make an award upon that basis would equate to compensating the defendant

for the withdrawal of the 3538 acres. To make an award that would pay for the establishing of a new water supply, or to pay for the higher cost of moving the cattle or to pay for the fencing lost and the refencing needed would be requiring the government to pay for the consequences of not renewing the lease for the 3538 acres. None of these consequences can be fairly said to have resulted from the taking of the 20 acres on August 30, 1984.

The opinion of market value after the taking and of the unity of the tracts and of just compensation expressed by Mrs. Truitt and by Mr. Witt are founded upon the changes wrought by the reduction in acreage by withdrawal of the 3538 acres. That event and its resulting change to the Truitt ranch is not the subject of this condemnation action and is outside the

scope of the Court's instructions to the Commission.

The opinion of Mr. Keever seems fair and well founded and within the guidelines of the instructions. The Commission finds there was no unity as an economic unit of the tract taken and the ranch remainder as of August 30, 1984. The Commission finds the fair market value and the reasonable award of just compensation to the defendant to be $11,000.

This hearing is deemed concluded with final deliberations being completed upon the 25th day of July, 1985.

Respectfully Submitted,

s/ Frank B. Zinn
Frank B. Zinn, Chairman

s/Curtis C. Graham
Curtis C. Graham

Dissenting Opinion

I agree and concur with the general statements of the foregoing report. However I believe that the loss of access to the river as a legal matter could have only happened when the land adjacent to the river was actually taken by the government. It is my finding that the cost of restoring a water supply as testified to by Mr. Witt and confirmed by Mrs. Truitt is a consequential damage suffered by Mrs. Truitt on account of the taking of the 20 acres. I would find the cost estimated to provide water in the sum of $29,354.80 as stated in Mr. Witt's opinion reasonable in amount. I would add this amount to the $11,000 for the 20 acres taken and find the total of these two figures, rounded to

$40,355. as just compensation for Mrs. Truitt to be awarded.

Concurring as modified s/SHERLEA TAYLOR

Sherlea Taylor

Addendum to Report of Land Commissioners

Index of Exhibits

Defendant's Ex.	
A	Letter with attached map Nov. 30, 1983, Bureau of Reclamation Projects Manager King to Atty Dow for Truitt.
B	Bureau of Land Management Letter of Feb 19, 1985 to Truitt re decision on grazing allotment boundary and livestock reduction.
D	Bureau of Reclamation grazing lease to Truitt for 1985 & transmittal letter.
D-1	Plat from Declaration of Taking, of 20 acres with description.
E	Bureau of Land Management letter of Jan. 24, 1985 to Truitt re decision on grazing allotment boundary and livestock reduction.
F-1	Bureau of Reclamation Letter of Aug. 24, 1984 to Atty Dow for Truitt notice to vacate the 3538 acres by Nov. 1, 1984.
F thru N (incl.) L-2, L-3	Photographs of scenes on Truitt ranch.

L-5 thru L-8 (incl.)	
P	Mrs. Truitt's notes on comparable sale and on livestock carrying capacity computations.
Q	Jim Witt's letter to Attys Dow & Gose, June 13, 1985, Appraisal of the Truitt property.
R	Mrs. Truitt's notes on her appraisal of the ranch.
S	Extracts from an Abstract of Title. U.S. patent to Charles Eddy.
T	Eddy County Deed Record of Warranty Deed from Pecos Irrigation Co. to the United States.

Plaintiff's Ex.

1	Report of Appraisal by Charles R. Keever dated March 14, 1984.
1-A	Updated Report of Appraisal by Keever dated June 17, 1985.
2	Map of Brantley Project and properties affected.
4	Map of Truitt ranch after Jan. 1, 1984.

6	Map of Truitt ranch before Dec. 31, 1983.
7	Letter dated Nov. 30, 1983 Bureau of Recl. to Atty Dow. (same as Deft. Ex A)
8	Map of Bureau of Reclamation Land (same as map in Defts Ex A)
9-A	Letter, Bureau of Reclamation dated Dec 9, 1983 to Mrs. Truitt, and to Atty Dow Dec 30, 1983 transmitting grazing lease for 1984.
9,10 & 11	Photographs of scenes on or near property taken.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1393HB

408.75 ACRES OF LAND; (HOWELL), (Brantley Dam Project)

Defendants.

REPORT OF LAND COMMISSIONERS

To: The Honorable Howard C. Bratton,
Chief Judge

From: Frank B. Zinn,
Curtis C. Graham,
Sherlea Taylor,
Land Commissioners.

Acting for the Court by authority of the appointment made pursuant to the Federal Rules of Civil Procedure, Rule 71A(h), 28 U.S.C.A., and the Court's instructions filed in this proceeding in condemnation, hearing was held to determine an amount of money to be awarded as just

compensation to the defendant land owner for the property taken by the Government.

The Commissioners respectfully submit to the Court, their findings and determinations.

1. Hearing Place and Dates: United States District Court Federal Building, Roswell, New Mexico, June 25th, 26th and 27th, 1985.

2. Appearances: For Plaintiff: Assistant United States Attorney, Raymond Hamilton. For Defendant: James L. Dow of Dow, Feezer & Williams P.A., Carlsbad, N.M. and Richard V. Gose, Santa Fe. N.M.

3. Basic HEaring Information: The property is taken in fee for the United States Department of Interior, Bureau of Reclamation, Brantley Project. A detailed description of the land, designated as Tract 52, is contained in schedule "A" attached to the Declaration of Taking filed

in this proceeding. The property is a farm with 370.5 acres mostly grazing land, some irrigated land with shallow water rights, improved with homes and other structures. The farm is located about mid-way between Carlsbad and Artesia, New Mexico a short distance from highway 285. The ownership is held jointly by the defendants Howell. The date of taking is September 20, 1984.

4. Rulings and Stipulations: The parties stipulated that the just compensation for the mineral estate being taken had been agreed upon and that the Commission need not hear or determine this matter.

Plaintiff objected to the introduction into evidence of the tabulation of approaches, (Defts Ex. O) by Jim Witt, or of Witt's testimony regarding his opinions expressed in this form, on the grounds of surprise, the material not having been

disclosed at the taking of his deposition. The Commission Chairman admitted the document in evidence and overruled the objection. A motion to strike testimony was also denied as to Witt testimony and Howell testimony that included elements of severance damage.

5. Summary of Evidence: J. Howard Howell of Lakewood, New Mexico, one of the landowners testified for defendants. He described the history of the development of the lands held by the Howell family. Using maps and photographs to illustrate his testimony he explained the methods of operation of the two units of the ranch. He described the makeup of the unit of the ranch which lies about eight miles west of the parcel being taken. This western unit is the larger part of the ranch and consists of parcels of fee land, and state and federal land under lease and some small

parcels of land in ownerships of others lying within the ranch unit's boundaries. The western unit is a dryland ranch, with windmills and catch basin tanks for stock watering, and wells and pumps for domestic water. There are two homes on the western unit as well as structures related to ranch operations. The western ranch was fenced into two pastures, a southerly portion comprising about ten sections and a northern pasture of about one and a half sections upon which the houses were also located. The ranching was a cow and calf livestock raising operation with stock remaining year long mostly on the western ranch with some rotation to the eastern unit pastures. The eastern unit, the farm taken in this action, plus grazing land leased from the Bureau of Land Management was used for the grazing of Howell cattle. A special use for the eastern unit in

connection with the livestock was as a place to put calves being weaned. Putting them there while leaving the mother cows on the western unit accelerated the weaning process. Mr. Howell described the farming on the eastern unit. They grew alfalfa and supplied all their own feed. They had raised other crops from time to time, barley, cotton and corn, and harvested the alfalfa seed, barley seed, tomatoes, melons and had a grove of 39 pecan trees from which they obtained a crop.

Mr. J. Howard Howell used a compilation of information that he and his brother had assembled for the purpose of testifying in this proceeding. This document is in evidence as Defts. Ex. N. The notes in the exhibit reflect much the same information as contained in his testimony at the hearing.

Water rights were described as 270 acre feet appurtenant to 90 acres of level irrigable farm land. Mr. Howell explained that they had adequate water every year without fail to produce at the well, 315 acre feet. They watered the 90 acres and also had levelled and were watering approximately 40 additional acres. They also sold water to oil drilling operators. Water quality was excellent, and was pumped from a sixty-foot depth at 1400 gpm.

They also sold caliche gravel from a pt on the farm.

The soil quality of the farm land was deep sandy loam. The water penetration was excellent. The land was level and the ditches were concrete.

Mr. Howell described the buildings on the farm and gave his opinions of fair market value of them. Photographs were put into evidence illustrating many of the

features described in testimony. (Defts Ex. L-1, M-1 thru M-11 incl.)

Mr. Howell expressed an opinion that the two ranch units were an economic unit. He said that much of the utility and value of the western ranch would be lost by the taking of the eastern farm. It was Mr. Howell's opinion that the fair market value of all the property should be considered both before and after the September 20, 1984 taking with the difference being the award as just compensation. Mr. Howell had gathered information on the sale of other ranch and farm property in the area. He used the method of evaluating the sales by translating market values to livestock carrying capacity. By comparison of the ranches and farms to the Howell property he came to a per animal value of the Howell ranches of $2,400. Applying a carrying capacity of 226 animals to this figure as

the before number he reached his opinion of before taking market value of the ranch as $1,370,663. Applying a reduced carrying capacity of 124 animals to the same $2,400 per animal value, he reached his opinion of the after taking market value of the ranch as $297,600. The differences between these amounts, $1,073,063. he expressed as his opinion of just compensation.

Mr. Richard Howell, brother of J. Howard Howell also testified. He affirmed his participation in the making of the compilation and statement of market value opinions with his brother. (defts. Ex. N) He identified the photographs that were moved into evidence. (Defts Ex. L-1, M-1 thru M-11 incl.) Richard Howell told of his growing up on the ranch. He described the method of jointly grazing the livestock even though they owned the cattle in different names and used different brands.

He affirmed the brother's description of the unified operation of the two parts of the ranch. He agreed that the opinions of market value and of the just compensation expressed by J. Howard Howell were also his opinions.

An exhibit placed in evidence established the state of the records of the State Engineer of New Mexico as to the water rights held by the Howell's and the land to which it was appurtenant. (Defts Ex B) The letter describes their permit to be for 270. acre feet per annum of shallow ground water rights and appurtenant to 90.0 acres of land. The well location and a description of the several parcels making up the acreage is listed.

A letter transmitting the declaration of taking to attorney Dow for the Howells and informing him of the November 15, 1984 deadline for cessation of their occupancy

of the land, from the Bureau of Reclamation Project Manger dated Oct. 3, 1984 was put into evidence. (Defts. Ex. F)

A letter from Atty Dow to the Bureau of Reclamation Director conveying a check for lease payment and the executed copies of the lease; with a copy of the check and of the 1984 grazing lease to Richard Howell are in evidence. (Defts. Ex G) The lease reflects that the acreage was 846.1 and the lease term was for one year ending Dec. 31, 1984. The land described is a part of the area covered by the eastern unit of the Howell ranch.

Another letter put into evidence was one from the USDI, Bureau of Land Management to the Howells, dated Feb. 21, 1985. In this letter the Howells are notified that the boundaries of their allotment and the number of animals permitted under their grazing preference

was being reduced. The boundary changes were stated in correlate with the loss of acreage resulting from the Bureau of Reclamation non-renewal of the grazing leases after they expired on December 31, 1984 and the taking of the fee land located on the ranch in the eastern area by virtue of the condemnation. The grazing permit before the adjustment was for 146 cows and 2 horses. The reduction proposed was to permit 125 cattle. What leases the defendants obtained or what cattle numbers they were permitted finally is not in the record, but inferred from the testimony must be those stated in the exhibit. (Defts Ex I)

The defendants presented the testimony of Jim Witt, Carlsbad, New Mexico, a professional appraiser. Mr. Witt told of his years of experience as an appraiser and of his education in the field. He also

related his experience in ranching. Mr. Witt had made an appraisal of the Howell ranch for the purposes of this action in condemnation. Mr. Witt had a number of handwritten notes and some typewritten pages of his work that he used in giving his testimony. These are in evidence. (Defts Ex. O and P)

Mr. Witt was of the opinion that just compensation for the property taken should be figured on the basis of the fair market value of all units of the ranch before the taking and of the fair market value of the western unit of the ranch after the taking. He was of the opinion that the fair market value should be based upon the value of the carrying capacity. He used his knowledge of comparable sales of ranch properties in the area to develop a sum to be attributed to each livestock unit. He then used the livestock unit values multiplying the

number of livestock units by the value per unit figure. This worked out to his before the taking estimates of 148 animals at $2,200. for the western ranch unit for a total of $325,600. and for the eastern ranch 78 animals at $2,200 totalling $156,000. He added to these values a sum for the irrigated land with water rights and other farm land, 45 acres totaled at $306,000. He added to this a sum for the dryland upon the eastern unit, $104,662. He made an estimate of the productive potential of the gravel pit for 40 years and capitalized the present worth for a sum of $63,015. He evaluated the pecan trees as being worth $19,387. He gave a value to the present worth of projected water sales for 11 years as $21,857. These figures were totalled by Mr. Witt to reach an amount of $996,521. which he expressed as his opinion of the market value of the

ranch property before the taking. He then calculated the after taking market value by multiplying 124 livestock carrying capacity units by the $2200. figure he assigned as their value, reaching the sum of $272,800. which he expressed as an opinion of the fair market value of the Howell ranch after the taking of September 20, 1984. His difference was $723,721. and this figure he stated with his opinion of just compensation that should be awarded the Howells.

The defendants put in evidence a photocopy from deed records of Eddy County a warranty deed from the Pecos Irrigation Company to the United States dated Dec. 18, 1905. No plat to show the land conveyed was provided. No testimony was offered to explain the effect of the deed. It describes a great many parcels of land, and

what appears to be all the works of the irrigation company.

In conjunction with the cross-examination of the plaintiff's witness Roland J. Fletcher, Defendants put into evidence a photocopy of a publication, "Uniform Appraisal Standards for Federal Land Acquisitions," Washington, D.C. 1973, Interagency Land Acquisition Conference. (Defts. Ex. U)

During the cross-examination of the witness, Jim Witt, the plaintiff, put in evidence a letter from Mr. Witt to the attorneys for the Howells, dated June 13, 1985. (Pltf Ex 6). In this letter Mr. Witt said he was changing his compensation figure from $729,122.76 to $873,765.36. His explanation of the letter was not clear in his testimony.

The plaintiff, the government, presented the testimony of Roland J.

Fletcher. Mr. Fletcher is a professional real estate appraiser. He described his education and experience in this field. He had made an appraisal report upon the Howell ranch unit comprising the fee land and improvements on the eastern area of their holdings. He did not include the western ranch in his appraisal. He explained that he was not requested to appraise that part of the Howell land. Only the parcel described in the declaration of taking was covered by his report. Mr. Fletcher's appraisal report is in evidence. (Pltfs. Ex. 2) Most of his testimony is repeated in the pages of his report. A resume of his qualifications is in the report. Some of the maps in the report in enlarged form were used to illustrate his testimony. The large maps were left out of evidence to avoid repetition and bulk. Two large maps are in

evidence. One is the Bureau of Reclamation map showing the Brantley Project and the several properties affected by the land acquisitions undertaken (Pltfs. Ex. 2) Another large map is one showing both of the ranch units belonging to the Howells. (Pltfs. Ex. 5) This map was used by witnesses for both parties in illustrating their testimony.

Mr. Fletcher in his testimony acknowledged that he was aware of the way the Howell family had managed the two separated areas of the ranch. He called it in his report, "a functioning ranch/farm combination, operating in two geographic locations, separated by about 8 miles." In testimony he gave his opinion that the two properties were not an economic unit. He said that under his instruction the taking of the eastern unit was not to be considered as anything other than a

complete taking. He acknowledged that the loss of the farm unit by the Howells would change their use of the western ranch.

Mr. Fletcher's data on what improvements were on the property and what the operation was on the farm did not differ in any important respects from those described by the Howells and Mr. Witt. He reported only 19.5 extra irrigated acres as compared to Mr. Howell's 40 acres above the 90 acres of land appurtenant to the water rights.

Mr. Fletcher gave his opinion that the highest and best use of the land taken was as a farm. He described this as a "hobby farm' because of the small size. He explains this as being a term used to described farms not sufficiently large, 100 acres or more of farmland, to be a commercial farm.

In his report and in his testimony Mr. Fletcher explained that he had studied the facts relating to sales of farms in the area of the Howell propery to find market data that he could apply in ascertaining probable value for the Howell farm or for some of the constituent parts of the farm. Using the sales information he believed was indicative of market value he found some per acre amounts to apply to the several categories of land taken from the Howells. These were used by him to form an opinion of value which he said and reported as being $2,000 per acre for the irrigated 90 acres; computing this to be $180,000. The dryland he figured at $350 per acre for 280.5 acres computed to $98,000. The figures for the land he said would include any land related improvements but would exclude the buildings. Mr. Fletcher made a building by building appraisal of the

houses and agricultural buildings using a cost of reproduction less depreciation method. He came up with a grand total figure of $119,000. His market value number for the whole tract and his opinion of the just compensation due the Howells was the total of the three numbers, $397,000.

6. Commission Determination. The commission finds that the highest and best use of the property taken is for farming. There has been a complete taking not a partial taking. The land taken and the remaining land of the defendants did not form an economic unit or tract as of the date of taking. The fair market value of the tract taken is $397,000 as of Sept. 20, 1984 and that an award in that amount would be just compensation to the defendants.

7. Discussion of Testimony and of the Commission Findings. The commission is

charged with a special finding of whether or not the two separated parts of the Howell family ranching operation were in fact interdependent so as to form an economic unit of such a nature that the loss of the part taken, the 370.5 acre farm caused a diminution of the fair market value of the land which was not taken. The Howells described how they used the two parts of the ranch to provide grazing rotation and to separate calf from mother at weaning time. These appear to be ranching practices that are merely matters of convenience that could have been achieved through the use of any other grazing land. There appeared to be no unique relationship between the tracts, no interdependence. The functioning of the western tract will remain as it was before, with the same boundaries; the same pastures; the same water supply; the same

access. The western ranch was owned as a separate unit long before the farm was acquired. The two units never became one economic unit in the sense of being functionally damaged when severed.

The opinions of market value and loss of market value of the remaining ranch expressed by the Howells and by Mr. Witt are founded in the evaluation of comparable sales with prices translated into livestock carrying capacity. The Howell numbers of 226 animals before and 124 animals after the taking and Mr. Witt's numbers reflect the loss of animal units decreed by the Bureau of Land Management. (Defts Ex. I) This reduction was ordered because of the loss of the 370.5 acres and also because of the loss of the 1,740 acres held by the Howells by the Bureau of Reclamation leases that were not renewed after Dec. 31, 1984. The net effect of the measure the owners

would have applied would be to compensate them for the loss of the grazing lease as well as for the land taken as of Sept. 20, 1984.

Because of the inclusion of the values attributable to the leases from the Bureau of Reclamation as well as because of the inclusion of the speculative values for such things as future water sale, the sales of caliche gravel for forty years, render the testimony of the Howells and Mr. Witt unacceptable under the instructions of the Court. Instructions 9 and 16 in essence require rejection of speculative elements of value. Opinions based upon such elements lack credibility. Under the guidance of instruction 21 as to the reception of expert testimony and of property owner testimony as to fair market value, the Commission has weighed the testimony of Mr. Witt and the Howells and

finds it is not acceptable for the reasons noted.

The Commission heard the testimony of Mr. Fletcher and has reviewed his report. The Commission finds his opinions of market value to be reasonable and within the guidelines of the Court's instructions. His opinion of the fair market value of the land taken is accepted and adopted by the Commission and is the basis for this Commission's recommended award of just compensation for the defendants in the amount of $397,000.00.

This hearing is deemed concluded with final deliberations being completed upon the 24th day of July, 1985.

Respectfully submitted,

S/ Frank B. Zinn
Frank B. Zinn, Chairman

S/ Curtis S. Graham
Curtis C. Graham

S/ Sherlea Taylor
Sherlea Taylor

Addendum to Report of Land Commissioners

INDEX OF EXHIBITS

Defendant's Ex.	
B	Letter to USDI, Bur. Reclamation, from State Engineer of N.M. dated June 21, 1984 describing water rights of 270 acre feet for 90 acres of land owned by Howells.
F	Letter from USDI Bur. Reclamation to Atty. Dow dated Oct. 3, 1984 advising of taking of Howell land and giving notice to vacate.
G	Letter from Atty Dow to USDI Bur of Reclamation dated Dec 27 1983 from Atty Dow for Howell transmitting executed leases and payment for 1984 grazing lease; with copy of check & lease.
I	Letter from USDI Bur. of Land Management to Howells, dated Feb 21, 1985 advising of reduction in grazing allotment boundaries and grazing preference animal numbers.
J	Pages from Eddy County NM deed records showing warranty deed from Pecos

	Irrigation Co. to the United States dated Dec 18, 1905.
L-1 M-1 thru M-11 incl.	Photographs of various aspects of the Howell property.
N	Statements of the land owners Howard Howell and Richard Howell dated June 14th, 1985.
O	Tabulations of Jim Witt of four approaches or alternate appraisals of the Howell property.
P	Tabulation of witness Jim Witt relating to his appraisal of the Howell property.
U	Uniform Appraisal Standards for Federal Land Acquisitions, published 1973, Interagency Land Acquisition Conference, Washington, DC.

Plaintiff's Ex.	
1	Appraisal Report of Howell property by Roland J. Fletcher, MAI
2	Bur. of Reclamation map of Brantley Project (filed with exhibits in Civ. 84-1272 HB)
5	Map, U.S.G.S. 7 Rivers & Foster quads. and overlay of Howell properties

6	Letter from Jim Witt to Attys Gose & Dow dated June 13, 1985 re appraisal.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1272HB

20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, WILMA DEAN TRUITT, et al., and ALL UNKNOWN OWNERS OF CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes on upon the objection of the defendants to the Report of the Land Commissioners. The court, having heard the parties on December 20, 1985, and having considered the objections and the arguments of the parties, concludes that the objections are not well taken.

Defendants' main objection is that the Commissioners failed to award severance damages. Severance damages are determined

by comparing the fair market value of the defendant's property before the taking and defendant's remaining property after the taking. Severance damages are only appropriate when a partial taking occurs. A partial taking is a taking whereby the owner's interest which is taken and the owner's remaining interest constitute one economic unit through the use or potential use of the tract at the time of taking.

The findings of the Commissioners are supported by substantial evidence and are not clearly erroneous. At the time of taking on August 13, 1984, defendant did not have a property interest of any kind in the 3538 acres of Bureau of Reclamation land which she had previously leased. The most she had was a license to use the land until November 1, 1984. Without the Bureau of Reclamation land, the Commissioners properly found that

defendant's ranch including the 20 acres condemned was not an economic unit for purposes of compensation. See United States v. Fuller, 409 U.S. 488 (1973).

Defendant also complains that she was not awarded compensation for any appurtenant water rights she had on the twenty acres for watering her cattle. Neither party presented testimony which valued any water rights associated with the twenty acres. Nor should she be awarded damages for putting in a water pipeline to replace her lost access to the water on the twenty acres. That loss is not due to this proceeding, but is due to the nonrenewal of her federal grazing lease.

Defendant has alluded many times during the course of these proceedings to her perception of bias on the part of the Land Commissioners in this cause. No substantial claim has been made which would

support the disqualification of any of the Commissioners from hearing this case.

Now, therefore,

IT IS BY THE COURT ORDERED that the defendant's objections to the report of the Commissioners are overruled and the Report of the Land Commissioners is approved and adopted.

_____

Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1393HB

408.75 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, HOWARD HOWELL, et al., and ALL UNKNOWN OWNERS OF CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes on upon the objection of the defendants to the Report of the Land Commissioners. The court, having heard the parties on December 20, 1985, and having considered the objections and the arguments of the parties, concludes that the objections are not well taken.

Defendants' main objection is that the Commissioners failed to award severance damages. Severance damages are determined

by comparing the fair market value of the defendant's property before the taking and defendant's remaining property after the taking. Severance damages are only appropriate when a partial taking occurs. A partial taking is a taking whereby the owner's interest which is taken and the owner's remaining interest constitute one economic unit through the use or potential use of the tract at the time of taking.

It is undisputed that the land taken in this action and defendants' remaining land were used as an integrated ranch. However, more is needed to show that a partial taking has occurred. A showing must be made that the tract taken and the tract remaining are so dependent on each other that the taking necessarily depreciates the value of the part remaining. "[S]trict proof of the loss of market value to the remaining parcel is

obligatory." United States v. Honolulu Plantation Co., 182 F.2d 172, 179 (9th Cir. 1950).

The findings of the Commissioners are supported by substantial evidence and are not clearly erroneous. At the time of taking on September 20, 1984, defendants were using the tract taken in conjunction with their remaining land for ranching. However, there is substantial evidence to support the Commissioners' findings that the remaining part of the ranch was not functionally damaged when severed from the portion taken.

The Commissioners in determining just compensation are free to accept the government's expert's valuation for the land as long as the expert's opinion is based on substantial evidence, not mere conjecture, speculation or unwarranted assumptions. United States v. Sowards, 370

F.2d 87, 92 10th Cir. 1966). The proper weight to be given to an expert's opinion is left to the Commissioners, after cross-examination, which may thoroughly test the opinion and the facts upon which the opinion rests.

Mr. Fletcher's testimony as to the value of defendants' property was not insubstantial. He relied on comparable sales of land in the area in making his determination of value which is an acceptable basis for expert opinion. United States v. Featherston, 325 F.2d 539 (10th Cir. 1963). His method of arriving at a fair market value for defendant's property was explained to the Commissioners and the Commissioners in their discretion choose to accept his opinion.

Defendants have alluded many times during the course of these proceedings to their perception of bias on the part of the

Land Commissioners in this cause. No substantial claim has been made which would support the disqualification of any of the Commissioners from hearing this case.

Now, therefore,

IT IS BY THE COURT ORDERED that the defendants' objections to the report of the Commissioners are overruled and the Report of the Land Commissioners is approved and adopted.

_____

Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1272HB

20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, WILMA DEAN TRUITT, et al., and ALL UNKNOWN OWNERS OF CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

O R D E R

This matter having come before the Court on defendant's motion for new trial, and the Court having found that the motion is not well taken; Now, Therefore,

IT IS BY THE COURT ORDERED that the defendants' motion for new trial is denied.

_____

Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1393HB

408.75 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, HOWARD HOWELL, et al., and ALL UNKNOWN OWNERS OF CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

O R D E R

This matter having come before the Court on defendant's motion for new trial, and the Court having found that the motion is not well taken; Now, Therefore,

IT IS BY THE COURT ORDERED that the defendants' motion for new trial is denied.

_____

Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1272HB

20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, WILMA DEAN TRUITT, et al., and ALL UNKNOWN OWNERS OF CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

FINAL JUDGMENT

THIS MATTER having come before the Court for entry of Final Judgment, and the Court being fully advised in the premises, FINDS:

1. That the Court has jurisdiction in this matter.

2. That by authority of a Complaint and Declaration of Taking, filed herein on the 30th day of August, 1984, the Plaintiff, United States of America, became

vested with fee title and mineral subordination in Tract No. 49, as more fully described in the Complaint, Declaration of Taking and Schedules thereto.

3. That at the date the Complaint and Declaration of Taking were filed, the Defendant Wilma Dean Truitt was the owner of Tract No. 49.

4. That at the date of said acquisition, the Plaintiff caused to be deposited $21,000.00 into the Registry of the Court for the benefit of persons or entities entitled thereto as estimated just compensation.

5. That by Commissioners' hearing held on the 24th and 25th of June, 1985, just compensation due the Defendant was determined to be $11,000.00.

6. The parties have, by Stipulation filed June 6, 1985, agreed that mineral

value for the subject property is $10,000.00.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

A. That by authority of the Complaint and Declaration of Taking filed herein August 30, 1984, the Plaintiff, United States of America, became vested with fee and mineral subordination title as more fully described in the Declaration of Taking and Schedules thereto.

B. That the just compensation payable by the Plaintiff to the Defendant Wilma Dean Truitt for the estate acquired is $21,000.00 inclusive of interest.

C. That the sum of $21,000.00 has been withdrawn from the Registry of the Court by the Defendant from the estimated just compensation deposited, by Order entered October 19, 1984.

D. That by Memorandum Opinion and Order entered January 16, 1986, the Defendant's Objections to the Report of the Land Commissioners were overruled and the Report was approved and adopted.

E. This matter is fully and finally concluded.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil No. 84-1393HB

408.75 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, HOWARD HOWELL, et al., and ALL UNKNOWN OWNERS OF CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

FINAL JUDGMENT

THIS MATTER having come before the Court for entry of Final Judgment, and the Court being fully advised in the premises, FINDS:

1. That the Court has jurisdiction in this matter.

2. That by authority of a Complaint and Declaration of Taking, filed herein on the 20th day of September, 1984, the Plaintiff, United States of America, became

vested with fee title and mineral subordination in Tract No. 52, 52-M, 52-M-4 and 52-M-7 as more fully described in the Complaint, Declaration of Taking and Schedules thereto.

3. That at the date the Complaint and Declaration of Taking were filed, the Howell Defendants, Viola Howell, Richard and Shirley Howell and James and Betty Howell, were owners of Tract No. 52, 52-M, 52-M-4 and 52-M-7.

4. That at the date of said acquisition, the Plaintiff caused to be deposited the total sum of $428,654.00 into the Registry of the Court for the benefit of persons or entities entitled thereto as estimated just compensation.

5. That by Commissioners' hearing held on the 25th through the 27th days of June, 1985, just compensation due the

Defendants was determined to be $397,000.00.

6. The parties have stipulated that the just compensation for the mineral estate subordination is $63,654.00; said Stipulation was filed June 6, 1985.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

A. That by authority of the Complaint and Declaration of Taking filed herein September 20, 1984, the Plaintiff, United States of America, became vested with fee and mineral subordination title as more fully described in the Declaration of Taking and Schedules thereto.

B. That the just compensation payable by the Plaintiff to the Defendants for the estate acquired is $460,654.00.

C. That the sum of $428,654.00 has been withdrawn from the Registry of the

Court by the Defendants from the estimated just compensation deposited.

D. That the deficiency amount, $32,000.00, shall be deposited into the Registry of the Court by the Plaintiff with 6% interest from the date of acquisition to the date of deposit.

E. That the Clerk of the Court shall disburse and have delivered $32,000.00 with interest as provided in paragraph E, payable to Viola Gibson Howell, Richard Howell and Howard Howell, to the Office of the United States Attorney's Office, District of New Mexico, for delivery to the Defendants.

F. That objections to the Report of the Land Commissioners were overruled by Memorandum Opinion and Order entered January 16, 1986, and the Report is adopted and approved.

G. This action shall be considered fully and finally concluded.

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. CIV-84-1272 HB

20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, WILMA DEAN TRUITT, et al., AND ALL UNKNOWN OWNERS OR CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

HEARING BEFORE THE

FEDERAL LAND COMMISSION

JUNE 24TH & 25TH, 1985

Held at the

FEDERAL COURTHOUSE BUILDING

ROSWELL, NEW MEXICO

COMMISSIONERS PRESENT:

HONORABLE FRANK ZINN, (District Judge Retired)

MRS. SHERLEA TAYLOR, Roswell, New Mexico

MR. CURTIS GRAHAM, Las Cruces, New Mexico

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does it?

A. No, sir, it was unfenced, I think the could use it.

Q. And they could have gone across it and gone to drink out of the Pecos River?

A. Certainly.

Q. Now, why didn't you do that, why didn't you appraise that in the before condition rather than just go over here and pick up the 20 acre parcel?

A. Why didn't I do it?

Q. Why didn't you do it?

A. Because I was asked to appraise the 20 acre tract.

Q. And that's the sole reason?

A. Yes, sir.

Q. Who asked you?

A. Who asked me to appraise the 20 acres?

Q. Yes?

A. The person or the agency?

Q. Both?

A. Tom Chapman, Realty Specialist, Bureau of Reclamation, Carlsbad office, Brantley Dam Project, Carlsbad, New Mexico.

Q. And if you had -- I think you had a contract with them?

A. Yes, we had a contract,yes. We still have a contract.

Q. And they told you somewhere in here, how to appraise that 20 acres, and you described that to this hearing --

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. CIV-84-1393 H.B.

408.74 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, HOWARD HOWELL, et al., AND ALL UNKNOWN OWNERS OR CLAIMANTS IN AND TO SAID LANDS OR ANY PART THEREOF,

Defendants.

HEARING BEFORE THE

FEDERAL LAND COMMISSION

JUNE 25TH & 26TH, 1985

Held at the

FEDERAL COURTHOUSE BUILDING

ROSWELL, NEW MEXICO

COMMISSIONERS PRESENT:

HONORABLE FRANK ZINN, (District Judge Retired)

MRS. SHERLEA TAYLOR, Roswell, New Mexico

MR. CURTIS GRAHAM, Las Cruces, New Mexico

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the western portion and the eastern portion of the Howell ranch as being used as unity of use, do you?

A. Well, I have no problem with that, it was certainly being operated -- operated, I emphasize -- as a single unit.

Q. You don't have any problem, do you, Mr. Fletcher, about the fact that when this eastern portion of the Howell ranch was taken, that a part of the ranch was taken, do you?

A. A part of the operating ranch was taken, certainly.

Q. So -- let me ask you to go to page 24 and on the bottom paragraph of page 24 of your instructions, as to a preferred way to determine compensation, in a partial taking, and what does it tell you to do?

A. It says, "The preferred way to determine compensation in partial taking cases is by the before and after method."

Q. Under this method, which usually is in the simple approach, just compensation is arrived at by first estimating the market value of the entire unit before the taking and then subtracting from the market value of what remains in the owner, after the taking; isn't that right?

A. That is correct.

Q. Why didn't you do that?

Because I was instructed to only appraise the eastern portion of the deeded ownership?

So you have pursued this matter as a matter of instructions, have you not?

That's correct.

All right.

MR. GOSE: The Defendants move the introduction of Defendant's Exhibit Q into evidence, which is the Uniform Appraisal Standards for Federal Land Acquisitions, the same that was introduced in the prior case.

MR. HAMILTON: I don't have any objection to that, Mr. Chairman.

MR. ZINN: All right, we've got it, thank you.

MR. GOSE: Mr. Chairman, I'll give you back this one so you can return it to the other case.

CHAIRMAN ZINN: Okay.

MR. GOSE: Thank you very much.

MR. GOSE:

Mr. Fletcher, I'd like to have you address yourself to page 31 of the appraisal that you have made with

regard to these properties,
particularly what you said

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 86-1387
	)	
20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, and WILMA DEAN TRUITT, et al. (Tract 49),	)	
	)	
Defendants-Appellants.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 86-1423
	)	
408.75 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, and HOWARD HOWELL, et al. (Tract 52),	)	
	)	
Defendants-Appellants	)	

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 86-2906
10.2 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, STATE OF NEW MEXICO, and HART GREENWOOD, et al,	)	
Defendants-Appellants.	)	

ORDER AND JUDGMENT

Before MCKAY, MCWILLIAMS, and MOORE, CIRCUIT JUDGES.

This order addresses three consolidated cases: United States v. 20 Acres of Land, United States v. 408.75 Acres of Land, and United States v. 10.2 Acres of Land. All three cases involve eminent domain actions brought by the United States to condemn land in Eddy County, New Mexico, for the Brantley Dam Project.

The district court, here, appointed a commission to determine just compensation. In condemnation proceedings in which a commission has been appointed by the trial court, the standard of review for this court is whether the trial court abused its discretion in appointing a commission to determine just compensation. United States v. Theimer, 199 F.2d 501, 503 (10th Cir. 1952). We find that the district court did not abuse its discretion in the appointment of the commission.

Appellants argue that they are entitled to a jury trial. "It has long been settled that there is no constitutional right to a trial by jury in eminent domain proceedings." United States v. Reynolds, 397 U.S. 14, 18 (1970). See also Bauman v. Ross, 167 U.S. 548, 593 (1897). However, under Rule 71A(h) of the Federal Rules of Civil Procedure,

> [A]ny party may have a trial by jury of the issue of just compensation by filing a demand therefor * * *, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

(Emphasis added). See United States v. Delaware, Lackawanna & W.R.R., 264 F.2d 112, 115 (3d Cir.), cert denied, 361 U.S. 819 (1959) ("From the wording of the rule it is apparent that the choice [of jury or

commission] is vested in the discretion of the court."). This court has held that a plaintiff in an eminent domain proceeding is entitled to a jury "unless, due to the character, location, or quantity of the property to be condemned, or some other reason in the interest of justice, the court in the appropriate exercise of its sound discretion appoints a commission." United States v. Waymire, 202 F.2d 550, 552 (10th Cir. 1953). See also United States v. Wallace, 20 F.2d 65 (10th Cir. 1952), United States v. Theimer, 199 F.2d 501 (10th Cir. 1952). In these consolidated cases, the district court stated in its memorandum order:

> [T]his case is one of fourteen currently pending involving the Brantley Dam and involves one of hundreds of tracts of land which will be acquired by the federal government over the life of the Project. In many of these cases severance damages will need to be determined, as well as the value of mineral interests and

> flowage easements. In such an instance appointment of a commission is justified in the interests of justice.

Addendum to Brief, Truitt Memorandum Opinion of March 25, 1985 ("3/25/85 Opinion") Tab D, at 1-2, 3. The circumstances which justified appointing a commission in Wallace and Waymire existed in the cases now before us.

Appellants next argue that the district court abused its discretion in not disqualifying Commissioner Zinn. The question whether a commissioner should be disqualified "is a matter for the exercise of discretion by the district judge, unless actual bias has been demonstrated beyond reasonable possibility of disagreement." United States v. Certain Parcels of Land, 384 F.2d 677, 681 (4th Cir. 1967). See also United States v. Lewis, 308 F.2d 453, 457 (9th Cir. 1962). Appellants made only vague allegations concerning bias on the

part of Commissioner Zinn. The district court did not abuse its discretion in denying appellant's motion to disqualify the Commissioner.

Appellants' argument that they are entitled to severance damages is also without merit. The standard of review articulated by this court is that "the appellate court reviews the determination of a district court in condemnation proceedings only to determine '. . .whether proper legal standards were applied in resolving the issue of just compensation and whether any supplemental findings of the district court were clearly erroneous.'" United States v. 179.26 Acres of Land, 644 F.2d 367, 369 (10th Cir. 1981) (citing United States v. Brinker, 413 F.2d 733 (10th Cir. 1969)). The district court's affirmance of the Commissioner's finding that appellants were not entitled

to severance damages was not clearly erroneous.

There is a two-tiered test for determining whether a party is entitled to severance damages: First, claimant must establish that the entire property constituted an "integrated use." Second, claimant must show loss of market value to the remaining parcel. Cole Investment Co. v United States, 258 F.2d 203, 204-05 (9th Cir. 1958). The landowner must first demonstrated "unity of ownership" of the land taken and the remaining parcels. United States v. 87.30 Acres of Land, 430 F.2d 1130, 1133 (9th Cir. 1970). Appellants here did not demonstrate unity of ownership or integrated use. Additionally, appellants failed to prove any loss in the market value of the parcel remaining after the taking. Therefore, the district court correctly held that the

Commissioner's finding that appellants were not entitled to severance damages was not clearly erroneous.

Appellants challenge sixteen of the twenty-seven instructions given to the commission by the district court, but failed to establish that any of the alleged errors in the commission instructions prejudiced them. Thus, there are no grounds for reversal. The challenged instructions, taken facially as a whole, do not constitute reversible error.

The district court judgment is AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge

FEBRUARY 13, 1989

Before Honorable Monroe G. McKay, Honorable Robert H. McWilliams and Honorable John P. Moore, Circuit Judges.

UNITED STATES OF AMERICA	)	
	)	Nos. 86-1387
v.	)	86-1423
	)	86-2906
20 ACRES OF LAND, etc., et al.,	)	
	)	
Defendants-Appellants.	)	

Appellants' motion for rehearing is denied by the hearing panel. 10th Cir.R. 35.2.1.

ROBERT L. HOECKER, Clerk

By _____
Patrick Fisher
Chief Deputy Clerk

Supreme Court, U.S.
FILED
AUG 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2022

In the Supreme Court of the United States

OCTOBER TERM, 1989

20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, NEW MEXICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
RICHARD B. STEWART
Assistant Attorney General
JACQUES B. GELIN
SARAH P. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether New Mexico law governs the questions whether petitioners were entitled to trial by jury and severance damages in condemnation actions initiated by the United States under Section 7 of the Reclamation Act of 1902, 43 U.S.C. 421.

2. Whether the district court abused its discretion in appointing a three-member commission, under Fed. R. Civ. P. 71A(h), to determine the amount to be awarded as just compensation in these condemnation actions.

3. Whether the district court abused its discretion in rejecting petitioners' motion to disqualify one of the appointed commissioners because of alleged bias.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2022

20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, NEW MEXICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-8A) is unreported. The pertinent orders and opinions of the district court in connection with the *Truitt* and *Howell* condemnation actions[1] are unreported: amended orders appointing commissioners, *Truitt* action, November 30, 1984, and January 30, 1985 (Pet. App. 10A-12A; Pet. App. 16A-18A); amended orders appointing commissioners, *Howell* action, November 13, 1984, and January 30,

[1] The individual petitioners (Wilma Dean Truitt and members of the Howell family) are landowners of two tracts of land condemned by the United States in separate actions. For clarity, we will refer to the separate proceedings as the "*Truitt* action" and the "*Howell* action," respectively.

1985 (Pet. App. 13A-15A; Pet. App. 19A-21A); order denying motion to reinstate jury, *Truitt* action, March 25, 1985 (Pet. App. 22A-31A); order denying motion to reinstate jury, *Howell* action, March 25, 1985 (Pet. App. 32A-41A); order adopting commissioners' recommendations, *Truitt* action, January 16, 1986 (Pet. App. 99A-102A); order adopting commissioners' recommendations, *Howell* action, January 16, 1986 (Pet. App. 103A-107A); final judgment of condemnation, *Truitt* action, February 14, 1986 (Pet. App. 110A-113A); final judgment of condemnation, *Howell* action, February 14, 1986 (Pet. App. 114A-118A).

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1988. A petition for rehearing was denied on February 13, 1989 (Pet. App. 9A). The petition for a writ of certiorari was filed on May 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As part of the Brantley Dam Project in Eddy County, New Mexico, the United States initiated separate condemnation actions[2] against two tracts of land in the District of New Mexico: (1) a 20-acre parcel of unimproved land owned in fee by petitioner Wilma Dean Truitt and (2) a 370.5-acre tract of improved land owned in fee

[2] Section 7 of the Reclamation Act of 1902, 43 U.S.C. 421, authorizes the Secretary of the Interior to acquire land for reclamation projects by either purchase or condemnation. Congress appropriated funds for the construction of the Brantley Dam Project by the Reclamation Project Authorization Act of 1972, Pub. L. No. 92-514, § 201, 86 Stat. 966.

by petitioner Howell family.[3] Pet. App. 43A-45A, 72A-73A.

In both the *Truitt* and *Howell* actions, the United States filed appropriate declarations of taking in the district court and deposited estimated amounts of just compensation—$21,000 for the *Truitt* tract and $428,654 for the *Howell* parcel. See 40 U.S.C. 258a. Pet. App. 110A-111A, 114A-115A. Thereafter, petitioners Truitt and the Howell family each filed a demand for jury trial, under Fed. R. Civ. P. 71A(h),[4] to determine the issue of just compensation.

The district court, under the authority of Rule 71A(h), rejected those demands, and appointed a three-member commission to determine the amount to be awarded as just compensation in both the *Truitt* and *Howell* actions. Pet. App. 10A-21A. Petitioners then filed separate motions to reinstate their demands for jury trial under Rule 71A(h). In opposing the district court's appointment of a commission, petitioners alleged, among other claims, that one panel member—Commissioner Zinn—should be disqualified because of alleged bias. Pet. App. 22A-23A, 26A-27A, 32A-33A, 36A-37A.

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[3] The commissioners described the *Howell* tract as "a farm with 370.5 acres [of] mostly grazing land, [that also include] some [90 acres of] irrigated land with shallow water rights, improved with homes and other structures" (Pet. App. 73A).

[4] Fed. R. Civ. P. 71A(h) provides in pertinent part:

> If the action involves the exercise of the power of eminent domain under the law of the United States, * * * any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * *, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

2. Following a consolidated evidentiary hearing, the district court issued separate (but identical) orders denying petitioners' motions (Pet. App. 22A-31A, 32A-41A).[5]

a. The district court acknowledged that under the terms of Rule 71A(h), a party to a condemnation action is entitled to a jury unless the "character, location, * * * quantity of the property to be condemned, or * * * other reasons in the interest of justice" call for the appointment of a commission (Pet. App. 24A (internal quotation marks and citation omitted)). See *United States* v. *Waymire*, 202 F.2d 550 (10th Cir. 1953); *United States* v. *Theimer*, 199 F.2d 501 (10th Cir. 1952).

Turning to the situation at hand, the court stated that each condemnation action "is one of fourteen currently pending condemnation actions involving the Brantley Dam and Reservoir Project" (Pet. App. 23A). The court accepted both the government's estimate "that the project will involve 41,300 acres, with over 12,000 of that being privately owned land" and its projection "that nearly 300 separate tracts will be acquired before the project is completed" (*ibid.*).[6] The court also found that "[t]he varying interests which the United States will seek to acquire in private acreage includes fee interests, mineral estates and flowage easements," and that the "size of the tracts to be acquired * * * vary, the largest being over 3,000 acres and the smallest apparently being individual lots in an undeveloped subdivision" (*id.* at 23A-24A). Under these circumstances, given the breadth and apparent complexity of those condemnation proceedings, the court concluded that "appointment of a commission is justified in the interests of justice" (*id.* at 26A).

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[5] We give citations only to the order filed in the *Truitt* action (Pet. App. 22A-31A).

[6] The court noted that, to date, the government had obtained only 67 tracts "either through sale or condemnation" (Pet. App. 23A).

b. The district court next considered petitioners' challenges to Commissioner Zinn's qualifications, which were based on the following allegations: (1) Zinn had disregarded instructions in a previous unrelated condemnation proceeding; (2) counsel for the landowners in that proceeding were " 'terribly upset' " with Zinn's actions (Gov't C.A. Br. 14 (quoting Mar. 8, 1985, Tr. 105)); and (3) Zinn, as a speaker at a contractors' seminar, " 'was out there hustling to obtain people to use his services as an arbitrator' " (*ibid.* (quoting Mar. 8, 1985, Tr. 43)).

The court rejected each of petitioners' challenges. First, after reviewing the transcript of the previous condemnation proceeding, the court specifically found that petitioners had taken Commissioner Zinn's comments "completely out of context to imply misfeasance on [his] part", because those "remarks were proper comments on the instructions to the commission" (Pet. App. 28A). Second, the court rejected as unsupported "hearsay" petitioners' assertion of "dissatisfaction" by the landowners' counsel in that prior proceeding, since "[n]o actual evidence of either the existence of attorney dissatisfaction or the grounds for the attorney's complaints was offered" (*id.* at 29A). Third, the court rejected petitioners' challenge based on Zinn's alleged statement at the seminar since they offered no supporting evidence. Finally, the court observed that petitioners had not shown "how * * * Zinn's conduct, if it occurred at all, was improper or gave rise to a conflict of interest" (*id.* at 30A).

In sum, the district court found that petitioners' "allegations of misfeasance, bias and conflict of interest are not substantiated by a shred of admissible evidence" (Pet. App. 30A). The court accordingly concluded that such "[u]nsubstantiated allegations * * * are certainly not sufficient for the court to exercise its discretion in disqualifying" Commissioner Zinn (*ibid.*).

3. The three-member commission held separate hearings in the *Truitt* and *Howell* actions to determine the value of the properties taken by the United States. In each case, Truitt and the Howell family, respectively, contended that the government's acquisition had effected a "partial taking"—*i.e.*, that the parcel taken had been part of a larger economic unit of land, so that "the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract." *United States* v. *Miller*, 317 U.S. 369, 376 (1943). See, *e.g.*, Pet. App. 60A, 91A. Agreeing with the government, the commission found that there had not been a partial taking in either case. Accordingly, the commission determined that the fair market value of each parcel was substantially in accord with the government's deposited estimated amounts of just compensation—$11,000 for the *Truitt* tract and $397,000 for the *Howell* parcel. Pet. App. 59A-60A, 91A.[7]

a. In assessing the fair market value of the 20-acre parcel at issue in the *Truitt* action, the commission recognized that, at one time before the government's taking, the parcel had been contiguous to a cattle ranch operated by petitioner Truitt. Pet. App. 61A. The commission found that the 11,446-acre ranch had consisted of a patchwork of different land tenures: fee land; lands leased from the State of New Mexico; federal lands used under grazing permits issued by the Bureau of Land Management (BLM) under the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*; 6,133

[7] In the *Truitt* action, petitioner Truitt and the United States stipulated to a $10,000 value of the mineral estate. Pet. App. 45A, 111A-112A. In the *Howell* action, the Howell family and the United States stipulated to a $63,654 value of the mineral estate. *Id.* at 73A, 116A. These stipulations account for the differences between the commission's assessments of fair market value of each parcel and the government's deposited estimated amounts of compensation.

acres of federal lands leased for grazing from the Bureau of Reclamation (BOR); and uncontrolled lands. Pet. App. 44A, 54A-56A; Gov't Exhs. 4, 6. Before the government's taking, however, the BOR lease to 3,538 of the 6,133 acres expired and was not renewed. This nonrenewal, as of the date of the government's August 1984 taking, left petitioner Truitt's 20-acre parcel isolated from the balance of her ranch lands. Pet. App. 44A, 61A; Gov't Exhs. 7, 9-A.

In these circumstances, the commission determined that the parcel's isolation precludes a finding of a partial taking. As the commission explained, "[t]o find a single economic unit, or a [use] or potential use for the 20 acres and the ranch remaining as of August 30, 1984, without including the 3538 acres is not reasonable" (Pet. App. 63A).[8] The commission accordingly concluded that to award petitioner Truitt "severance damages" would effectively compensate her for the nonrenewal of the BOR lease to the 3,538 acres (*id.* at 63A-64A). Instead, the commission found that "the highest and best use of the [20-acre parcel] is for development as rural recreational homesites" and that the parcel's fair market value is $11,000 (*id.* at 59A-60A).

b. In assessing the fair market value of the 370.5-acre parcel at issue in the *Howell* action, the commission recognized that, at one time before the government's taking, the parcel (consisting of a farm and homes) had been contiguous to other non-fee lands used by the Howell family—1,740 acres of federal lands leased from the BOR and uncontrolled lands. After the taking, however, the contiguous BOR lease expired and had not been renewed. Pet.

[8] The commission found little probative value in petitioner Truitt's evidence concerning her use of the 20-acre parcel in connection with the balance of the ranch, because that evidence involved operation of the ranch *before* the parcel had become isolated. Pet. App. 59A-64A.

App. 81A-82A; Howell Exhs. I, G. The commission also found that the Howell family used a nearby second group of properties for ranching. These properties, located eight to fifteen miles west of the 370.5 acre parcel, consisted of an amalgam of federal lands, state lands, fee lands, and uncontrolled lands. Pet. App. 74A-75A; Gov't Exh. 5.

In resolving the partial taking claim, the commission considered "whether or not the two separated parts of the Howell family ranching operation were in fact interdependent so as to form an economic unit of such a nature that the loss of the part taken * * * caused a diminution of the fair market value of the land which was not taken" (Pet. App. 92A). The commission noted that the Howell family "used the two parts of the ranch to provide grazing rotation and to separate calf from mother at weaning time," but also made clear that "[t]hese appear to be ranching practices that are merely matters of convenience that could have been achieved through the use of any other grazing land" (*ibid.*). The commission found "no unique relationship between the two tracts," and accordingly concluded that "[t]he two units never became one economic unit in the sense of being functionally damaged when severed" (*id.* at 92A, 93A).

Apart from declining to award severance damages based on the absence of unity between the two tracts, the commission determined that the alleged damages sought by the Howell family resulted substantially from the nonrenewal of the BOR lease—an event that occurred after the government's taking. Pet. App. 93A.[9] Instead of awarding

[9] The commission also rejected the Howell family's request for damages for other items, such as "future water sale" and "the sales of caliche gravel for forty years" (Pet. App. 94A). It found that such claims were "speculative" and accordingly held them "unacceptable under the instructions of the Court," which effectively "require rejection of speculative elements of value" (*ibid.*).

severance damages based on a partial taking, the commission concluded that "[t]here has been a complete taking," and that "the highest and best use of the property taken is farming" (*id.* at 91A). It found the parcel's fair market value to be $397,000 (*ibid.*).

4. The district court approved and adopted the commission's report in both the *Truitt* and *Howell* actions (Pet. App. 99A-102A, 103A-107A).

a. In the *Truitt* action, the district court found that the commission's findings with respect to the claim for severance damages "are supported by substantial evidence and are not clearly erroneous" (Pet. App. 100A). It thus agreed with the commission's determination not to award such damages where the record shows that petitioner Truitt's "ranch[,] including the 20 acres condemned[,] was not an economic unit for purposes of compensation" (*id.* at 101A). And, in response to petitioner's renewed challenge to the commission's alleged bias, the court reiterated that "[n]o substantial claim has been made which would support the disqualification of any of the Commissioners from hearing this case" (*id.* at 101A-102A).

b. In the *Howell* action, the district court also found that the commission's findings with respect to the claim for severance damages "are supported by substantial evidence and are not clearly erroneous" (Pet. App. 105A). The court noted that "[i]t is undisputed that the land taken * * * and [the Howell family's] remaining land were used as an integrated ranch" (*id.* at 104A). It stressed, however, that "more is needed to show that a partial taking has occurred. A showing must be made that the tract taken and the tract remaining are so dependent on each other that the taking necessarily depreciates the value of the part remaining" (*ibid.*). The court thus agreed with the commission's

determination not to award severance damages where "there is substantial evidence to support the Commissioners' findings that the remaining part of [the Howell family's] ranch was not functionally damaged when severed from the portion taken" (*id.* at 105A).[10]

5. After consolidating the *Truitt* and *Howell* actions, the court of appeals affirmed (Pet. App. 1A-8A). In response to petitioners' contention that they were entitled to a jury trial, the court of appeals cited the established principle " 'that there is no constitutional right to a trial by jury in eminent domain proceedings' " (*id.* at 3A (quoting *United States* v. *Reynolds*, 397 U.S. 14, 18 (1970)), and recognized that, under Fed. R. Civ. P. 71A(h), the district court exercises discretion in ruling on demands for jury trial in condemnation actions. Pet. App. 4A-5A. In the circumstances presented, where the *Truitt* and *Howell* actions were only two of numerous other Brantley Dam cases pending, and where many of these cases raise complex valuation questions, the court of appeals held that the district court had exercised its sound discretion in appointing a commission under Rule 71A(h). Pet. App. 5A.

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[10] The court also rejected the Howell family's challenge to the method of determining fair market value used by the government's expert witness and adopted by the commission. Pet. App. 105A-106A.

Finally, the court rejected the Howell family's renewed challenge to the commission's alleged bias for the same reasons it rejected petitioner Truitt's identical claim. Pet. App. 106A-107A.

After denying post-trial motions in both actions (Pet. App. 108A, 109A), the district court entered separate final judgments awarding petitioner Truitt a total of $21,000 in just compensation (*id.* at 110A-112A) and the Howell family at total of $460,654 (*id.* at 114A-118A). Since the United States had not deposited a sufficient amount in the *Howell* action, the district court ordered the government to deposit an additional $32,000 (plus six percent interest from the date of taking) into the court registry for payment to the landowner (*id.* at 117A).

The court of appeals also rejected petitioners' claim that the district court erred in refusing to disqualify Commissioner Zinn. It found that petitioners "made only vague allegations concerning bias on the part of Commissioner Zinn" (Pet. App. 6A), and that the district court accordingly had not abused its discretion in allowing him to participate.

Turning to petitioners' contentions that the United States had effected partial takings and should have paid severance damages, the court of appeals agreed with the district court that neither petitioner had made the requisite showing, namely, that the "entire property constituted an 'integrated use' " and that there was " 'unity of ownership' of the land taken and the remaining parcels" (Pet. App. 7A-8A). The court of appeals also noted that petitioners each "failed to prove any loss in market value of the parcel remaining after the taking" (*id.* at 8A).[11]

ARGUMENT

The decision of the court of appeals correctly applies established legal principles to the particular facts presented and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioners principally contend (Pet. 27-34) that New Mexico law, not federal law, governs the questions whether they were entitled to trial by jury and severance

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[11] Finally, the court of appeals rejected petitioners' challenges to a number of the district court's instructions to the commission, concluding that petitioners "failed to establish that any of the alleged errors * * * prejudiced them" (Pet. App. 8A). In any event, the court held that "[t]he challenged instructions, taken facially as a whole, do not constitute reversible error" (*id.* at 8A-9A). See Gov't C.A. Br. 34-40.

damages in these condemnation actions. The federal government's obligation to pay just compensation for takings of private property derives from the Fifth Amendment. As this Court has recognized, "[i]f there is a taking, the claim is founded upon the Constitution." *United States* v. *Causby*, 328 U.S. 256, 267 (1946) (internal quotation marks and citation omitted)). Consequently, it is well established that federal law governs "questions of substantive right" in federal condemnation actions. *United States* v. *Miller*, 317 U.S. 369, 380 (1943); see, *e.g.*, 40 U.S.C. 258a.[12]

Contrary to petitioners' assertion, federal law governs "the measure of compensation" (*United States* v. *Miller*, 317 U.S. at 380), which includes the question of severance damages (*id.* at 375-376).[13] And Fed. R. Civ. P. 71A(a) makes clear that "[t]he Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in [Rule 71A]." Thus, since Congress has affirmatively chosen not "to make state laws applicable," *United States* v. *93.970 Acres*, 360 U.S. 328, 333 (1959), Fed. R. Civ. P. 71A(h) plainly governs a landowner's right to jury trial on

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[12] See also *United States* v. *93.970 Acres*, 360 U.S. 328, 332-333 (1959) ("Condemnation involves essential governmental functions. * * * We have often held that where essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable.").

[13] Petitioners may not rely on the lands leased from the BOR as supplying the requisite "unity of ownership" with respect to each of their parcels. As Section 3 of the Taylor Grazing Act, 43 U.S.C. 315b, makes clear, "the issuance of a [grazing] permit * * * shall not create any right, title, interest, or estate in or to the lands." Cf. *United States* v. *Fuller*, 409 U.S. 488, 490-494 (1973).

the issue of just compensation in a federal condemnation action. See note 4, *supra*.

Petitioners' assertion (Pet. 28-30) that New Mexico law applies in these condemnation acts stems from a misreading of Section 8 of the Reclamation Act of 1902, 43 U.S.C. 383,[14] and this Court's decision in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). By its terms, Section 8 requires only that the United States, in connection with a reclamation project, recognize water and riparian rights created by state law, and compensate for any such rights taken. But Section 8 does not suggest that state law displaces federal law (including Fed. R. Civ. P. 71A(h)) as the substantive and procedural law governing condemnation actions—particularly where, as here, the United States did not take state-created water rights.[15]

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[14] Section 8 of the Reclamation Act of 1902, 43 U.S.C. 383, provides:

> Nothing in this Act shall be construed as affecting or intending to affect or to any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

[15] Contrary to petitioners' suggestions (Pet. 20, 23, 37), the government did not take any water rights in the *Truitt* action. As the district court made clear, "[n]either party presented testimony which valued any water rights associated with the twenty acres" (Pet. App. 101A). And in the *Howell* action, the United States did not take water rights as such; it took fee simple title to the 370.5-acre tract, which included 90 acres of adjudicated shallow water rights (see *id.* at 72A-73A).

In *Gerlach Live Stock Co.*, the Court therefore turned to California state law "to determine the rights and liabilities of landowner and appropriator" (339 U.S. at 742), specifically, whether state law recognized a "right of inundation" (*id.* at 754). Having concluded that California recognized that riparian right (*id.* at 742-755), the Court held that the United States must compensate those whose right to inundation had been taken in the federal government's construction of the Central Valley Project in California (*id.* at 754-755). See *California* v. *United States*, 438 U.S. 645, 669 n.21 (1978) ("Congress in the 1902 Act intended to follow state law as to appropriation of water and condemnation of water rights."). The decision in *Gerlach Live Stock Co.* thus was a particular application, in the context of riparian rights, of the general principle that, while federal law governs federal condemnation proceedings, state law ordinarily defines the particular property rights being taken.

2. Petitioners also contend (Pet. 34-39) that the district court erred in appointing a three-member commission, under Fed. R. Civ. P. 71A(h), to determine the amount to be awarded as just compensation in these condemnation actions. As Rule 71A(h) makes plain, the district court, "in its discretion," determines whether a jury or a commission should decide in the first instance the issue of just compensation. See note 4, *supra*; *United States* v. *Delaware, Lackawanna & W.R.R.*, 264 F.2d 112, 115 (3d Cir.), cert. denied, 361 U.S. 819 (1959). In both the *Truitt* and *Howell* actions, the district court, in ultimately concluding that the appointment of a commission would be "in the interests of justice" (Pet. App. 26A, 36A), expressly considered the number of Brantley Dam cases pending, the potential for additional cases to be filed, the vast acreage to be acquired for the project, and the diversity of interests to be acquired (*id.* at 23A-26A,

33A-36A).[16] These are the very factors specified in Rule 71A(h)—"the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice" (Fed. R. Civ. P. 71A(h)). The district court therefore properly exercised its discretion in appointing a commission.

3. Finally, petitioners renew their contention (Pet. 39-42) that the district court should have disqualified Commissioner Zinn because of alleged bias. The decision to disqualify a commissioner appointed under Fed. R. Civ. P. 71A(h) is "a matter for the exercise of discretion by the district judge, unless actual bias has been demonstrated beyond reasonable possibility of disagreement." *United States* v. *Certain Parcels of Land*, 384 F.2d 677, 681 (4th Cir. 1967). In this case, petitioners made "only vague allegations concerning bias on the part of Commissioner Zinn" (Pet. App. 6A). And, as the district court specifically found, petitioners offered no admissible or credible evidence showing any bias on his part. See *id.* at 26A-30A, 36A-40A; p. 5, *supra*. In these circumstances, both the district court and the court of appeals correctly rejected petitioners' unfounded challenge.[17]

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[16] Petitioners err in asserting (Pet. 35-36) that the federal government's witness (presumably referring to Realty Officer Chapman) testified that there would be no more than five condemnation actions filed in the district court in connection with the Brantley Dam Project. Chapman testified that there were some six to twelve of the more complex Brantley Dam cases then pending. See Mar. 8, 1985, Tr. 80.

[17] Petitioners err in asserting that the Assistant United States Attorney representing the government in this case "present[ed] Zinn's case before the [district court at the evidentiary hearing]" (Pet. 39; see *id.* at 41). The AUSA's arguing in opposition to petitioners' motion to disqualify scarcely resembles his representing Commissioner Zinn's individual legal interests.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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